

CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
Bureau of Customs and Border Protection
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade***

VOL. 38

SEPTEMBER 1, 2004

NO. 36

This issue contains:

Bureau of Customs and Border Protection
General Notices
U.S. Court of International Trade
Slip Op. 04-101 Through 04-103

**DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION**

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

**Please visit the U.S. Customs and Border Protection
Web at: <http://www.cbp.gov>**

Bureau of Customs and Border Protection

General Notices

PROPOSED COLLECTION; COMMENT REQUEST

Alien Crewman Landing Permit

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Alien Crewman Landing Permit. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before October 18, 2004, to be assured of consideration.

ADDRESS: Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 344-1429.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of

capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Alien Crewman Landing Permit

OMB Number: 1651-0114

Form Number: Form CBP-95A and 95B

Abstract: This collection of information is used by CBP to document conditions and limitations imposed upon an alien crewman applying for benefits under Section 251 of the Immigration and Nationality Act.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension

Affected Public: Individuals

Estimated Number of Respondents: 433,000

Estimated Time Per Respondent: 5 minutes

Estimated Total Annual Burden Hours: 35,939

Estimated Total Annualized Cost on the Public: \$359,390

Dated: August 11, 2004

TRACEY DENNING,
*Agency Clearance Officer,
Information Services Group.*

[Published in the Federal Register, August 18, 2004 (69 FR 51317)]

Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Functions (COAC)

ACTION: Notice of Committee Renewal and Request for Applications for Membership

SUMMARY: The Department of Homeland Security (DHS) and Department of the Treasury are providing this notice of the renewal of the charter for the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Func-

tions (COAC). This notice also requests qualified individuals interested in serving on this committee to apply for membership.

DATES: Applications for membership should reach the office on or before September 25, 2004. Applications should be submitted in sufficient time to be received by the close of business on the closing date.

ADDRESSES: You may request a copy of the COAC's charter or file an application for COAC membership by writing to Ms. Monica Frazier, Office of the Assistant Secretary for Border and Transportation Security, Department of Homeland Security, Washington, DC 20528 Attn: COAC 2004. Facsimile applications are acceptable, sent to 571-227-1937 - Attn: COAC 2004. Contact Ms. Frazier with any questions at 571-227-3977.

FOR FURTHER INFORMATION CONTACT: Ms. Monica Frazier, Office of the Assistant Secretary for Border and Transportation Security, Department of Homeland Security, Washington, DC 20528, telephone 571-227-3977; facsimile 571-227-1937.

SUPPLEMENTARY INFORMATION: The Secretary of the Department of Homeland Security and the Secretary of the Treasury have determined that the renewal of the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Functions (COAC) is necessary and in the public interest in connection with the duties of the respective Departments. This determination follows consultation with the Committee Management Secretariat, General Services Administration.

NAME OF COMMITTEE: Departmental Advisory Committee on Commercial Operations of Customs and Border Protection and Related Functions (COAC).

PURPOSE AND OBJECTIVE: The purpose of the Committee is to provide advice to the Secretary of the Treasury and the Secretary of Homeland Security on all matters involving the commercial operations of bureau of Customs and Border Protection (CBP) and related functions within DHS or Treasury and to submit an annual report to Congress describing its operations and setting forth any recommendations. The Committee provides a critical and unique forum for distinguished representatives of diverse industry sectors to present their views and advice directly to senior Treasury, DHS, and customs officials. This is done on a regular basis in an open and candid atmosphere.

DURATION: Continuing.

BALANCED MEMBERSHIP PLANS: The members will be selected by the Secretary of the Treasury and the Secretary of Homeland Security jointly from representatives of the trade and transpor-

tation community that do business with CBP, or others who are directly affected by customs commercial operations and related functions. In addition, members shall represent major regions of the country, and, by statute, not more than ten members may be affiliated with the same political party.

Background

In the Omnibus Budget Reconciliation Act of 1987 (Pub. L. 100-203), Congress directed the Secretary of the Treasury to create an Advisory Committee on Commercial Operations of the Customs Service. The Committee is to consist of 20 members drawn from industry sectors affected by Customs commercial operations with balanced political party affiliations. The Committee's first two-year charter was filed on October 17, 1988, and the committee has been renewed seven times since then.

With the creation of the Department of Homeland Security, the Secretary of the Treasury delegated a joint chair and Committee management role to the Secretary of Homeland Security (see 19 CFR Part 0 Appx.). Under this delegation, and pursuant to sections 412(a)(1) and 1512(d) of the Homeland Security Act of 2002 (P. L. 107-296), the Committee's name is being changed to the Departmental Advisory Committee on Commercial Operations of Customs and Border Protection.

Due to the importance and usefulness of this Committee to both Departments, DHS and Treasury are revising the Committee's charter to provide the Committee discretion to advise not only on the commercial operations of CBP, but also on the related functions of DHS and Treasury.

It is expected that, during its ninth two-year term, the Committee will consider issues relating to enhanced border and cargo supply chain security. COAC will continue to provide advice and report such matters as on customs modernization and automation, informed compliance and compliance assessment, account-based processing, commercial enforcement and uniformity, international efforts to harmonize customs practices and procedures, strategic planning, northern border and southern border issues, and relationships with foreign customs authorities.

Both DHS and Treasury have functions related to CBP commercial operations, such as Coast Guard operations involving vessels in international commerce, the Transportation Security Administration's operations affecting international commerce and transportation security, and Treasury regulatory and policy functions related to the customs revenue functions. Accordingly, DHS and Treasury have determined to empower COAC to provide advice and report on not only CBP commercial operations as such, but also those other DHS or Treasury functions that are related to those operations to ensure

both Departments and Congress have the perspective of the COAC on the range of critical issues relating to CBP's commercial operations functions.

Committee Membership

Membership on the Committee is personal to the appointee and is concurrent with the two-year duration of the charter for the ninth term. Under the Charter, a member may not send an alternate to represent him or her at a Committee meeting. However, since Committee meetings are open to the public, another person from a member's organization may attend and observe the proceedings in a non-participating capacity. Regular attendance is essential; the Charter provides that a member who is absent for two consecutive meetings or two meetings in a calendar year shall be recommended for replacement on the Committee.

No person who is required to register under the Foreign Agents Registration Act as an agent or representative of a foreign principal may serve on this advisory committee.

Members who are currently serving on the Committee are eligible to reapply for membership provided that they are not in their second consecutive term and that they have met attendance requirements. A new application letter (see addresses) is required, but it can incorporate by reference materials previously filed (please attach courtesy copies).

Members will not be paid compensation by the Federal Government for their services with respect to the COAC, nor shall they be considered Federal Government employees for any purpose. No per diem, transportation, or other expenses are reimbursed by the Federal Government for the expenses they incur in attending Committee meetings at any location.

Application for Advisory Committee Appointment

There is no prescribed format for the application. Applicants may send a letter describing their interest and qualifications and enclose a resume.

Any interested person wishing to serve on the (COAC) must provide the following:

- Statement of interest and reasons for application;
- Complete professional biography or resume;
- Political affiliation, in order to ensure balanced representation. (Mandatory. If no party registration or allegiance exists, indicate "independent" or "unaffiliated").

DHS and Treasury are particularly interested in receiving applications from individuals with extensive experience in maritime cargo shipping. DHS and Treasury are also interesting in receiving appli-

cations from individuals with extensive small business or small business association experience in the commercial operations of customs and related functions.

In addition, all applicants must state in their applications that they agree to submit to pre-appointment background and tax checks. (Mandatory). However, a national security clearance is not required for the position.

Dated: August 11, 2004

C. STEWART VERDERY, JR.
Assistant Secretary
(Border and Transportation
Security Policy and Planning)
Department of Homeland Security.

TIMOTHY E. SKUD,
Deputy Assistant Secretary
(Tax, Trade, and Tariff Policy),
Department of the Treasury.

[Published in the Federal Register, August 26, 2004 (69 FR 52516)]

19 CFR Part 123

Required Advance Electronic Presentation of Cargo Information: Compliance Dates for Truck Carriers

AGENCY: Customs and Border Protection, DHS.

ACTION: Announcement of compliance dates.

SUMMARY: This document informs truck carriers when they will be required to transmit advance electronic cargo information to Customs and Border Protection regarding cargo they are bringing into the United States, as mandated by section 343(a) of the Trade Act of 2002 and the implementing regulations. The dates when truck carriers will be required to comply vary depending on the port of entry at which the truck carrier will be arriving in the United States.

DATES: The implementation schedule set forth in the SUPPLEMENTARY INFORMATION discussion specifies three compliance dates, depending on the location of the port of entry.

FOR FURTHER INFORMATION CONTACT: For questions concerning Inbound Truck Cargo: James Swanson, Field Operations, (202) 344-2576.

SUPPLEMENTARY INFORMATION:

Background

Section 343(a) of the Trade Act of 2002, as amended (the Act; 19 U.S.C. 2071 note), required that Customs and Border Protection (CBP) promulgate regulations providing for the mandatory collection of electronic cargo information, by way of a CBP-approved electronic data interchange system, before the cargo is brought into or departs the United States by any mode of commercial transportation (sea, air, rail or truck). The cargo information required is that which is reasonably necessary to enable high-risk shipments to be identified for purposes of ensuring cargo safety and security and preventing smuggling pursuant to the laws enforced and administered by CBP.

On December 5, 2003, CBP published in the **Federal Register** (68 FR 68140) a final rule intended to effectuate the provisions of the Act. In particular, a new § 123.92 (19 CFR 123.92) was added to the CBP Regulations to implement the inbound truck cargo provisions of the Act's provisions. Section 123.92 describes the general requirement that for any inbound truck required to report its arrival under § 123.1(b), that will have commercial cargo aboard, CBP must electronically receive certain information regarding that cargo through a CBP-approved electronic data interchange (EDI) system no later than 1 hour prior to the carrier's reaching the first port of arrival in the United States. For truck carriers arriving with shipments qualified for clearance under the FAST (Free and Secure Trade) program, CBP must electronically receive such cargo information through the CBP-approved EDI system no later than 30 minutes prior to the carrier's reaching the first port of arrival in the United States.

To effect the advance electronic transmission of the required truck cargo information to CBP, CBP has approved two interim EDI systems, for use until the Automated Commercial Environment Truck Manifest becomes fully operational. The two systems are the Pre-Arrival Processing System (PAPS) and QP/WP (an Automated Broker Interface (ABI) in-bond processing system that allows ABI filers to create and process in-bond shipments).

Truck carriers bringing commercial cargo subject to advance cargo information requirements into the United States must use one of the two interim EDI systems described above, with the two exceptions set forth below in the CAFES AND BRASS EXCEPTION portion of this document.

All commercial cargo is subject to advance cargo information requirements, pursuant to § 123.92(b), except for the following:

- (1) Cargo in transit from point to point in the United States. Domestic cargo transported by truck and arriving at one port from another in the United States after transiting Canada or Mexico (§ 123.21; § 123.41); and

(2) Certain informal entries:

- (i) Merchandise which is informally entered on Customs Form (CF) 368 or CF 368 A (cash collection or receipt);
- (ii) Merchandise unconditionally or conditionally free, not exceeding \$2000 in value, eligible for entry on CF 7523; and
- (iii) Products of the United States being returned, for which entry is prescribed on CF 3311.

It should be noted that upon final implementation of the Truck Manifest module of the Automated Commercial Environment, the exempted information described in (2) above will be transmitted electronically in advance of cargo arrival in order to expedite release and processing.

It is further noted that § 123.92(c)(2) allows a United States importer, or its customs broker, to elect to present to CBP a portion of the required information that it possesses in relation to the cargo. Under such circumstance, the truck carrier is responsible for presenting to CBP the remainder of the required cargo information.

CAFES and BRASS Exceptions

As a temporary accommodation, CBP will not require either of the CBP-approved EDI systems to be used if the merchandise transported by the truck carrier is currently approved for processing under the Customs Automated Forms Entry System (CAFES) or the Border Release Advanced Screening and Selectivity (BRASS) programs. Under the BRASS program, the following conditions must be met:

- (1) The importer and shipper involved in the transaction are current BRASS participants (as of the date of publication of this notice);
- (2) The importer and shipper have engaged in a minimum number of BRASS import transactions during the previous calendar year. The minimum number is currently 50, but CBP retains the right to change this number as a matter of policy. Any policy changes regarding the minimum number of BRASS transactions will be communicated by the CBP BRASS Processing Center or through Port Information Notices;
- (3) The truck carrier carrying the merchandise only utilizes drivers who are registered under the Free and Secure Trade (FAST) program and carrying a FAST Driver Card. This requirement does not apply at the ports of Eastport, Idaho; International Falls, Minnesota; Grand Portage, Minnesota; and Jackman, Maine, where FAST Driver Cards are not available. This requirement will apply at these ports when CBP publishes a **Federal Register** notice announcing that CBP is ready to register FAST drivers at these geographic locations; and

- (4) For processing along the southern border, the truck carrier participates in an approved industry partnership program, such as C-TPAT (Customs-Trade Partnership Against Terrorism).

Implementation of Advance Electronic Information Requirements

Section 123.92(e) requires CBP, 90 days prior to mandating advance electronic information at a port of entry, to publish notice in the **Federal Register** informing affected carriers that the EDI system is in place and fully operational. Accordingly, in this document, CBP is notifying truck carriers when they will be required to present advance electronic cargo information regarding cargo arriving at particular ports of entry in the United States through a CBP-approved EDI system. The implementation schedule will be staggered in three phases.

The above-described interchange systems are now in place and operational at the forty ports of entry listed in the "Compliance Dates" section of this document, under the caption "First Implementation". Truck carriers, which will first arrive in the United States at these ports, will be required, 90 days from the date of publication of this notice in the **Federal Register**, to comply with the advance electronic transmission requirements set forth in § 123.92, CBP Regulations.

Two additional implementations are scheduled for the remaining ports. Consistent with the provision in § 123.92(e) that requires CBP to announce when ports are fully operational, CBP is announcing by this document that the remaining fifty-nine ports listed in the second and third phases of implementation will become fully operational at least 90 days before truck carriers are required to transmit advance electronic information to CBP at those ports. The schedule for implementing the advance electronic transmission requirements at all ninety-nine ports is summarized below in the "Compliance Dates" section.

Compliance Dates

First Implementation

Effective November 15, 2004, truck carriers must commence the advance electronic transmission to CBP of required cargo information for inbound cargo at the following forty ports of entry (corresponding port code and field office location appear in parenthesis next to port location):

- (1) Buffalo, NY (0901, Buffalo);
- (2) Alexandria Bay, NY (0708, Buffalo);
- (3) Ogdensburg, NY (0701, Buffalo);

- (4) Massena, NY (0704, Buffalo);
- (5) Detroit, MI (3801, Detroit);
- (6) Port Huron, MI (3802, Detroit);
- (7) Sault Ste. Marie, MI (3803, Detroit);
- (8) Algonac, MI (3814, Detroit);
- (9) Blaine, WA (3004, Seattle);
- (10) Sumas, WA (3009, Seattle);
- (11) Lynden, WA (3023, Seattle);
- (12) Oroville, WA (3019, Seattle);
- (13) Frontier, WA (3020, Seattle);
- (14) Laurier, WA (3016, Seattle);
- (15) Point Roberts, WA (3017, Seattle);
- (16) Danville, WA (3012, Seattle);
- (17) Ferry, WA (3013, Seattle);
- (18) Metaline Falls, WA (3025, Seattle);
- (19) Laredo, TX (2304, Laredo);
- (20) Eagle Pass, TX (2303, Laredo);
- (21) Brownsville, TX (2301, Laredo);
- (22) Progresso, TX (2309, Laredo);
- (23) Del Rio, TX (2302, Laredo);
- (24) Hidalgo/Pharr, TX (2305, Laredo);
- (25) Roma, TX (2310, Laredo);
- (26) Rio Grande City, TX (2307, Laredo);
- (27) El Paso, TX (2402, El Paso);
- (28) Presidio, TX (2403, El Paso);
- (29) Fabens, TX (2404, El Paso);
- (30) Columbus, NM (2406, El Paso);
- (31) Santa Teresa, NM (2408, El Paso);
- (32) Douglas, AZ (2601, Tucson);
- (33) Lukeville, AZ (2602, Tucson);
- (34) Naco, AZ (2603, Tucson);
- (35) Nogales, AZ (2604, Tucson);
- (36) Sasabe, AZ (2606, Tucson);
- (37) San Luis, AZ (2608, Tucson);
- (38) Tecate, CA (2505, San Diego);
- (39) Calexico, CA (2507, San Diego);
- (40) Otay Mesa, CA (2506, San Diego).

Second Implementation

Effective December 15, 2004, truck carriers must commence the advance electronic transmission to CBP of required cargo information for inbound cargo at the following forty-three ports of entry:

- (41) Champlain, NY (0712, Buffalo);
- (42) Trout River, NY (0715, Buffalo);
- (43) Pembina, ND (3401, Seattle);
- (44) Noyes, MN (3402, Seattle);
- (45) Portal, ND (3403, Seattle);

- (46) Neche, ND (3404, Seattle);
- (47) St. John, ND (3405, Seattle);
- (48) Northgate, ND (3406, Seattle);
- (49) Walhalla, ND (3407, Seattle);
- (50) Hannah, ND (3408, Seattle);
- (51) Sarles, ND (3409, Seattle);
- (52) Ambrose, ND (3410, Seattle);
- (53) Antler, ND (3413, Seattle);
- (54) Sherwood, ND (3414, Seattle);
- (55) Hansboro, ND (3415, Seattle);
- (56) Maida, ND (3416, Seattle);
- (57) Fortuna, ND (3417, Seattle);
- (58) Westhope, ND (3419, Seattle);
- (59) Noonan, ND (3420, Seattle);
- (60) Carbury, ND (3421, Seattle);
- (61) Dunseith, ND (3422, Seattle);
- (62) Warroad, MN (3423, Seattle);
- (63) Baudette, MN (3424, Seattle);
- (64) Pine Creek, MN (3425, Seattle);
- (65) Roseau, MN (3426, Seattle);
- (66) International Falls, MN (3604, Seattle);
- (67) Grand Portage, MN (3613, Seattle);
- (68) Richford, VT (0203, Boston);
- (69) Derby Line, VT (0209, Boston);
- (70) Norton, VT (0211, Boston);
- (71) Beecher Falls, VT (0206, Boston);
- (72) Highgate Springs, VT (0212, Boston);
- (73) Houlton, ME (0106, Boston);
- (74) Bridgewater, ME (0127, Boston);
- (75) Fort Fairfield, ME (0107, Boston);
- (76) Limestone, ME (0118, Boston);
- (77) Van Buren, ME (0108, Boston);
- (78) Madawaska, ME (0109, Boston);
- (79) Fort Kent, ME (0110, Boston);
- (80) Calais, ME (0115, Boston);
- (81) Vanceboro, ME (0105, Boston);
- (82) Eastport/Lubec, ME (0103, Boston);
- (83) Jackman, ME (0104, Boston).

Third Implementation

Effective January 14, 2005, truck carriers must commence the advance electronic transmission to CBP of required cargo information for inbound cargo at the following sixteen ports of entry:

- (84) Eastport, ID (3302, Seattle);
- (85) Porthill, ID (3308, Seattle);
- (86) Sweetgrass, MT (3310, Seattle);
- (87) Raymond, MT (3301, Seattle);

- (88) Turner, MT (3306, Seattle);
- (89) Scobey, MT (3309, Seattle);
- (90) Whitetail, MT (3312, Seattle);
- (91) Piegan, MT (3316, Seattle);
- (92) Opheim, MT (3317, Seattle);
- (93) Roosville, MT (3318, Seattle);
- (94) Morgan, MT (3319, Seattle);
- (95) Whitlash, MT (3321, Seattle);
- (96) Del Bonita, MT (3322, Seattle);
- (97) Alcan, AK (3104, Portland);
- (98) Skagway, AK (3103, Portland);
- (99) Dalton Cache, AK (3106, Portland).

DATED: August 12, 2004

ROBERT C. BONNER,
Commissioner,
Customs and Border Protection.

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.

Washington, DC, August 18 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
*Acting Assistant Commissioner,
Office of Regulations and Rulings.*

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF AN AIR BLOW GUN KIT

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of tariff classification ruling letter and revocation of treatment relating to the classification of an air blow gun kit.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that the Bureau of Customs and Border Protection (CBP) intends to revoke a ruling letter relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of an air blow gun kit. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before October 1, 2004.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: David Salkeld, General Classification Branch, at (202) 572-8781.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke a ruling letter relating to the tariff classification of an air blow gun kit. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter (NY) K85017, dated April 26, 2004 (Attachment A), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or

CBP's previous interpretation of the HTSUS. Any person involved with substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY K85017, CBP classified an air blow gun kit under subheading 8467.19.5090, HTSUSA, which provides for "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Pneumatic: Other: Other: Other."

Based on our analysis of the scope of the terms of headings 8424 and 8467, HTSUS, the Legal Notes, and the Explanatory Notes, we now believe the air blow gun kit is classified under subheading 8424.20.9000, which provides for, "Mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines; parts thereof: Spray guns and similar appliances: Other."

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY K85017 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 967219 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions that is contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

DATED: August 16, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY K85017

April 26, 2004

CLA-2-84:RR:NC:1:104 K85017

CATEGORY: Classification

TARIFF NO.: 8467.19.5090

MS. SARALEE ANTRIM-SAIZAN
CARMICHAEL INTERNATIONAL SERVICE
533 Glendale Boulevard
Los Angeles, California 90026-5097

RE: The tariff classification of an air blow gun kit from China

DEAR MS. ANTRIM-SAIZAN:

In your letter dated March 16, 2004 on behalf of Alltrade, Inc. of Long Beach, California you requested a tariff classification ruling.

A sample has been provided of the Trades Pro 15 pc. Air Tool Accessory Kit, Model # 835048. This air blow gun kit includes a blow gun, three nozzles, two male and two female connectors, two universal adapters, two quick couplers, a dual tire chuck, tire gauge and wire brush. All of these items are packaged for retail on a hanging blister card. The blow gun (for blowing out tubes and pipes, and other air cleaning applications) will be used with a compressor. It is connected to the compressor's hose utilizing the connectors, couplers and adapters in the kit. The sample will be returned per your request.

General Rule of Interpretation (GRI) 1, HTS, states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. Goods that are, *prima facie*, classifiable under two or more headings, are classifiable in accordance with GRI 3, HTS. GRI 3(a) states in part that when two or more headings each refer to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific, even if one heading gives a more precise description of the goods.

The air blow gun kit consists of at least two different articles that are, *prima facie*, classifiable in different headings. The kits consist of articles put up together to carry out a specific activity (i.e., air cleaning operations). Finally, the articles are put up in a manner suitable for sale directly to users without repacking. Therefore, the kits in question are within the term "goods put up in sets for retail sale." GRI 3(b) states in part that goods put up in sets for retail sale, which cannot be classified by reference to GRI 3(a), are to be classified as if they consisted of the component which gives them their essential character. It is the opinion of this office that the air blow gun imparts the essential character to this kit.

The applicable subheading for the Trades Pro 15 pc. Air Tool Accessory Kit will be 8467.19.5090, Harmonized Tariff Schedule of the United States (HTS), which provides for tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: pneumatic: other. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert Losche at 646-733-3011.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967219
CLA-2 RR:CR:GC 967219 DSS
CATEGORY: Classification
TARIFF NO.: 8424.20.9000

Ms. SARALEE ANTRIM-SAZAN
CARMICHAEL INTERNATIONAL SERVICE
533 Glendale Boulevard
Los Angeles, CA 90026-5097

RE: Revocation of NY K85017; air blow gun kit from China

DEAR Ms. ANTRIM-SAZAN:

This letter is pursuant to the Bureau of Customs and Border Protection (CBP) reconsideration of New York Ruling Letter (NY) K85017, dated April 26, 2004, which was issued to you on behalf of Alltrade, Inc. by the Director, National Commodity Specialist Division, New York, with respect to the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of the air blow gun kit. After review of NY K85017, CBP has determined that the classification of the kit under subheading 8467.19.5090, HTSUS, was incorrect.

FACTS:

In NY K85017, CBP wrote, in relevant part:

A sample has been provided of the Trades Pro 15 pc. Air Tool Accessory Kit, Model # 835048. This air blow gun kit includes a blow gun, three nozzles, two male and two female connectors, two universal adapters, two quick couplers, a dual tire chuck, tire gauge and wire brush. All of these items are packaged for retail on a hanging blister card. The blow gun (for blowing out tubes and pipes, and other air cleaning applications) will be used with a compressor. It is connected to the compressor's hose utilizing the connectors, couplers and adapters in the kit. . . .

The air blow gun kit consists of at least two different articles that are, prima facie, classifiable in different headings. The kits consist of articles put up together to carry out a specific activity (i.e., air cleaning

operations). Finally, the articles are put up in a manner suitable for sale directly to users without repacking. Therefore, the kits in question are within the term "goods put up in sets for retail sale." GRI 3(b) states in part that goods put up in sets for retail sale, which cannot be classified by reference to GRI 3(a), are to be classified as if they consisted of the component which gives them their essential character. It is the opinion of this office that the air blow gun imparts the essential character to this kit.

The kit was classified under subheading 8467.19.5090, HTSUS, which provides for, "Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof: Pneumatic: Other: Other: Other."

ISSUE:

What is the proper tariff classification for the instant air blow gun kit?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. GRI 2 is not applicable here except insofar as it provides that "[t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3 provides as follows:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
- (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUSA and are thus useful in ascertaining the classification of merchandise under the System. CBP be-

lieves the ENs should always be consulted. See T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

8424	Mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines; parts thereof:
8424.20	Spray guns and similar appliances:
8424.20.9000	Other
	* * * *
8467	Tools for working in the hand, pneumatic, hydraulic or with self-contained electric or nonelectric motor, and parts thereof:
	Pneumatic:
8467.19	Other:
8467.19.50	Other
8467.19.5090	Other

We still believe that the kit is considered a set under GRI 3(b) and that its essential character is provided by the air blow gun. However, upon reexamination of the kit, it is apparent that the kit is not classified under heading 8467, but instead should be classified under heading 8424, which provides for spray guns and similar appliances, by operation of Note 2 to Chapter 84, HTSUS.

The kit meets the GRI 3(b) and attendant EN (X) definition of "goods put up in sets for retail sale." First, the kit consists of at least two different articles which are, *prima facie*, classifiable in two different headings. Second, the items are put up together to carry out the specific activity of spraying air or air cleaning operations and the items will be used together or in conjunction with one another. Third, the articles are put up in a manner suitable for sale directly to users without repacking. We thus believe that the kit qualifies as a set of GRI 3(b).

The factor which determines essential character may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. GRI 3(b) EN (VIII). As was stated in NY K86865, it is the air blow gun that imparts the essential character of the kit as it sprays the air needed for the air cleaning operations.

Chapter 84, Note 2, HTSUS, states:

Subject to operation of note 3 to section XVI, a machine or appliance which answers to a description in one or more of the headings 8401 to 8424 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group and not the latter. . .

The question then is whether the air blow gun kit is classified under heading 8424, HTSUS. We believe that it is. EN 84.24 provides in pertinent part:

(B) Spray Guns and Similar Appliances

Spray guns and similar hand controlled appliances are usually designed for attaching to compressed air or steam lines, and are also connected, either directly or through a conduit, with a reservoir of the material to be projected. . . . They may also be used for projecting a powerful jet of compressed air or steam for cleaning stonework in buildings, statuary, etc.

The group also includes separately presented hand controlled "anti-smudge" spraying devices for fitting to printing machines, and hand controlled metal spraying pistols operating either on the principle of a blow pipe, or by the combined effect of an electric heating device and a jet of compressed air. . . .

The instant air gun would seem to fall under the terms of the heading and the language within EN 84.24, which states that hand controlled appliances fitted with triggers or other valves for controlling flow through the nozzle fall under heading 8424. Furthermore, similar products have been classified under subheading 8424.20.90, HTSUS. In NY 832130, dated October 14, 1988, CBP classified an air blow gun used for cleaning dust and other impurities, and a general purpose spray gun used for high volume application of enamels, varnish and similar materials under that heading. *See also* NY R00091, dated February 5, 2004 (classifying spray-on tanning system under subheading 8424.20); NY F80605, dated December 16, 1999; NY 801566, dated September 14, 1994; and NY 865507, dated August 15, 1991.

From the description provided to CBP, we feel that the air blow gun falls under the definition of spray gun or similar appliance for tariff purposes. In this instance, the air blow gun will be connected to a compressor and will be used to blow out tubes and pipes and for other air-cleaning operations by shooting a jet of compressed air. Chapter 84, Note 2 compels classification of this kit under heading 8424.

HOLDING:

In accordance with the above discussion, the correct classification for the air blow gun kit is under subheading 8424.20.9000, HTSUSA, which provides for "Mechanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines; parts thereof: Spray guns and similar appliances: Other." The 2004 general rate of duty is free.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY K85017 is REVOKED.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach

Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

Slip Op. 04-101

BEFORE: HON. RICHARD W. GOLDBERG, SENIOR JUDGE

CONSOLIDATED TEXTILES, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 03-00872

[Defendant's motion to dismiss granted.]

Date: August 11, 2004

Gregory S. Menegaz (Sonnenschein Nath & Rosenthal LLP) for plaintiff Consolidated Textiles, Inc.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*) for defendant United States.

OPINION

GOLDBERG, Senior Judge: In this action, plaintiff Consolidated Textiles, Inc. ("Consolidated Textiles") seeks an order requiring defendant United States ("the Government") to liquidate and reliquidate certain entries of polyester staple fiber from the Republic of Korea imported by Consolidated Textiles ("the subject entries"). Pursuant to liquidation instructions issued by the U.S. Department of Commerce ("Commerce"), the subject entries are subject to anti-dumping duties at the initial "all other" exporters and producers rate of 11.35 percent *ad valorem*. Consolidated Textiles, which did not challenge the initial "all others" rate established in the anti-dumping duty determination, argues that it is entitled to the lowered "all others" rate of 7.91 percent *ad valorem* determined by Commerce on remand. The Government moves to dismiss pursuant to USCIT R. 12(b)(1) and 12(b)(5).

For the reasons that follow, the Court grants the Government's motion to dismiss.

I. BACKGROUND

On April 29, 1999, Commerce initiated an investigation into an antidumping petition filed with Commerce regarding certain polyester staple fiber from Korea and Taiwan. See *Initiation of Antidumping Duty Investigations: Certain Polyester Staple Fiber From The Republic Of Korea And Taiwan*, 64 Fed. Reg. 23053 (Apr. 29, 1999). As an importer of the subject merchandise, Consolidated Textiles participated in this investigation. On May 25, 2000, Commerce issued its *Notice of Amended Final Determination Of Sales At Less Than Fair Value: Certain Polyester Staple Fiber From The Republic Of Korea ("Amended Final Determination")*, 65 Fed. Reg. 33807 (May 25, 2000), in which Commerce determined rates for two of the investigated producers as well as an "all others" rate of 11.35 percent applicable to all other importers in the investigation, including Consolidated Textiles. *Id.*

On June 22, 2000, timely complaints were filed with the Court of International Trade by domestic petitioner E.I. DuPont de Nemours, Inc., and by Geum Poong Corp. and Sam Young Synthetics, two investigated producers of the subject merchandise, contesting the manner in which Commerce determined their dumping margins in the *Amended Final Determination*. Consolidated Textiles did not challenge Commerce's determination at this time. In that action, the Court remanded Commerce's determination for proper calculation of Geum Poong's constructed value rate on two occasions. See *Geum Poong Corp. v. United States*, 25 CIT 1089, 163 F. Supp. 2d 669 (2001). In its second redetermination, Commerce determined Geum Poong's antidumping margin to be *de minimis*, and although the "all others" cash deposit rate was not at issue in that case, it was recalculated and lowered from 11.35 percent to 7.91 percent. *Redetermination Pursuant to Court Remand Order in Geum Poong Corp. v. United States*, Court. No. 00-06-00298 (Apr. 30, 2002) at 1, *aff'd*, No. 03-1056, 1057 (Fed. Cir., Oct. 9, 2003).

Consolidated Textiles attempted to intervene in the *Geum Poong* litigation in July 2002. On July 26, 2002, the Court granted Consolidated Textiles status as a plaintiff-intervenor, and issued a temporary restraining order preventing Commerce from liquidating Consolidated Textiles's entries. Geum Poong and Sam Young Synthetics filed timely objections under USCIT R. 24, which requires that interested parties may only intervene after 30 days of the filing of the complaint upon a showing of "good cause." Based on USCIT R. 24, the Court vacated its order granting Consolidated Textiles intervenor status and dissolved the temporary restraining order. *Geum Poong v. United States*, 26 CIT ___, Slip Op. 02-84 (Aug. 6, 2002), *aff'd*, No. 02-1573, 1578 (Fed. Cir., Oct. 2, 2002).

On July 17, 2002, Commerce issued liquidation instructions to the United States Bureau of Customs and Border Protection ("Customs") ordering the liquidation of certain entries imported by Consolidated

Textiles at the 11.35 percent cash deposit rate established in the *Amended Final Determination*. Customs began liquidating entries made in the third period of review — May 1, 2002 through April 30, 2003. On July 1, 2003, Commerce initiated an administrative review of the subject merchandise for the third period of review. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 Fed. Reg. 39055 (July 1, 2003). On December 10, 2003, Consolidated Textiles filed a complaint and a motion for a preliminary injunction. In its complaint, Consolidated Textiles requested that the Court “enjoin any further liquidation of Plaintiff’s third review entries of subject [polyester staple fiber] from Korea until the litigation affecting the legality of the ‘all others’ rate is final[,]” and “require the Commerce Department to instruct Customs to reliquidate all *liquidated* entries made during the period May 1, 2002 through April 30, 2003 . . . by Plaintiff of the subject merchandise that were liquidated at 11.35 percent if the final rate is 7.91 percent[.]” Compl. at 6. Sitting in motion part, the Court granted Consolidated Textiles’s motion for preliminary injunctive relief by Memorandum Opinion and Order dated December 19, 2003. Per the Court’s order, Customs remains enjoined from further liquidating any entries of polyester staple fiber from the Republic of Korea that were imported by Consolidated Textiles on or after May 1, 2002.

II. DISCUSSION

A. The Court Has Subject Matter Jurisdiction Pursuant to 28 U.S.C. § 1581(i).

The Government contends that the Court lacks subject matter jurisdiction over Consolidated Textiles’s claim pursuant to 28 U.S.C. § 1581(i). Defendant’s Memorandum Of Law In Support Of Its Motion To Dismiss (“Def.’s Br.”) at 14. The Government argues that § 1581(i) jurisdiction cannot be invoked because Consolidated Textiles could have brought an action under 28 U.S.C. § 1581(c). *Id.* at 16. However, like the importer in *Consolidated Bearings v. United States*, Consolidated Textiles is not challenging the final results of an administrative review, but rather the liquidation instructions Commerce issued to Customs, an action which could not have been brought under 28 U.S.C. § 1581(c). 348 F.3d 997, 1002 (Fed. Cir. 2003); see also *Shinyei Corp. of America v. United States*, 355 F.2d 1297, 1305 (Fed. Cir. 2004) (quoting *Consolidated Bearings*, 348 F.3d at 1002). Thus, in accordance with the Court’s finding in its Memorandum Opinion and Order granting Consolidated Textiles’s motion for a preliminary injunction, the Court finds that 28 U.S.C. § 1581(i) provides jurisdiction over the instant matter.

B. Consolidated Textiles's Claim Is Not Barred by the Doctrine of Collateral Estoppel.

The Government contends that Consolidated Textiles's claim is barred by the doctrine of collateral estoppel because Consolidated Textiles is seeking a remedy it could have sought, and previously attempted to seek, from the Court. Def.'s Br. at 19. The Government maintains that Consolidated Textiles is merely realleging a claim already made in challenging Commerce's application of the initial "all others" rate to entries of merchandise entered during the first, second, and third administrative periods of review. *Id.* at 21. However, upon consideration of the four-prong test set forth in *Thomas v. General Services Administration*, the Court finds that Consolidated Textiles's claim is not precluded. 794 F.2d 661, 664 (Fed. Cir. 1986). *Thomas* requires that the following four conditions be met in order to apply collateral estoppel:

- (1) the issue previously adjudicated is identical with that now presented;
- (2) that issue was actually litigated in the prior case;
- (3) the previous determination of that issue was necessary to the end-decision then made; and
- (4) the party precluded was fully represented in the prior action.

Id.

In addressing the first and second prongs of the *Thomas* test, the Court finds that the legal issue presented here is not identical to any issue that was actually litigated previously in the *Geum Poong* litigation. In this case, Consolidated Textiles contests Commerce's instructions to Customs ordering liquidation of the subject entries at the "all others" rate of 11.35 percent. In the *Geum Poong* litigation, the issue was whether Commerce had properly determined the dumping margins of Geum Poong Corp. and Sam Young Synthetics. Whether Consolidated Textiles is entitled to the lowered "all others" rate of 7.91 percent clearly is not an issue that was previously adjudicated in the *Geum Poong* litigation, thereby barring the application of collateral estoppel. In addition, the fourth prong of the *Thomas* test lends further support to the Court's finding that collateral estoppel is not applicable because Consolidated Textiles was not even a party to the prior action, much less a "fully represented" party.

Moreover, the Court has been reluctant to apply collateral estoppel in trade cases as a matter of policy:

The burden on the party seeking issue preclusion is and should be exacting. This is especially so in trade cases. . . . Since the agencies involved perform the function of expert finders of fact

concerning different programs, different time frames, economic statistics and other factors . . . , principles of issue preclusion should be carefully applied. To hold otherwise would have a chilling effect upon the administrative processes envisioned by the Congress.

E.I. DuPont de Nemours & Co. v. United States, 23 CIT 343, 347 n.6 (1999) (citing *PPG Indus., Inc. v. United States*, 13 CIT 297, 302, 712 F. Supp. 195, 199 (1989)).

Accordingly, the Court holds that Consolidated Textiles's claim is not barred by the doctrine of collateral estoppel.

C. Consolidated Textiles Has Failed to State a Claim Upon Which Relief Can Be Granted.

The Government argues that Consolidated Textiles has failed to state a claim upon which relief can be granted. According to the Government, liquidation of the subject entries is in accordance with 19 U.S.C. § 1516a(c)(1), which provides that:

entries of merchandise of the character covered by a determination . . . shall be liquidated in accordance with the determination of the Secretary . . . if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination.

19 U.S.C. § 1516a(c)(1). Pursuant to this statutory authority, Commerce ordered liquidation of the subject entries under 19 C.F.R. § 351.212(c), which provides for automatic assessment of antidumping duties at the rate equal to cash deposit of estimated antidumping duties required at the time of entry on merchandise not covered by a timely request for an administrative review. See 19 C.F.R. § 351.212(c)(2).

An importer should not benefit from a lower rate established by a judicial or administrative decision if in fact the importer did not participate in the underlying proceedings. See *J.S. Stone, Inc. v. United States*, 27 CIT ___, ___, 297 F. Supp. 2d 1333, 1343-45 (2003); see also *United States v. ITT Indus., Inc.*, 28 CIT ___, ___, Slip Op. 04-81, 30 (July 8, 2004) (citing *Consolidated Bearings*, 348 F.3d at 1005-06).

In *J.S. Stone*, the antidumping duty order at issue set the estimated duty rate of J.S. Stone, an importer of the subject merchandise, at 43.72 percent *ad valorem*. *Id.* at ___, 297 F. Supp. 2d at 1336. SICC, a producer from whom J.S. Stone imported the subject merchandise, requested an administrative review. *Id.* J.S. Stone did

not participate in the review, however. *Id.* at ____ , 297 F. Supp. 2d at 1337. In its questionnaire responses, SICC failed to report its sales of the subject merchandise to J.S. Stone. *Id.* As a result, SICC's sales to J.S. Stone were not used by Commerce in computing the revised 0.11 percent dumping rate for SICC, and Commerce ultimately instructed Customs to liquidate J.S. Stone's entries at the 43.72 percent cash deposit rate. *Id.*

J.S. Stone filed suit in the CIT, seeking a refund on the difference between the cash deposit rate it paid on antidumping duties and the rate determined for SICC. *Id.* at ____ , 297 F. Supp. 2d at 1342. In rejecting J.S. Stone's claim, the Court held that "[n]ormally, the only means an interested party has of ensuring that it receives the actual antidumping duty rate is through participation in the antidumping review. . . . If an importer decides not to participate in an administrative review, it bears the risk that Commerce may err in calculating the dumping margin." *Id.* at ____ , 297 F. Supp. 2d at 1344. Thus, "if an antidumping review is not requested, antidumping duties are collected on the unspecified merchandise in the amount of the cash deposit paid at the time of importation, which is published as the 'all others' rate in the Federal Register." *Id.* (referring to 19 C.F.R. § 351.212 (1998)).

Here, Consolidated Textiles did not timely intervene in the *Geum Poong* litigation. See *Geum Poong v. United States*, 26 CIT ____ , Slip Op. 02-84 (Aug. 6, 2002), *aff'd*, No. 02-1573, 1578 (Fed. Cir., Oct. 2, 2002). Rather, as the Government correctly points out, "the *Geum Poong* litigation concerned only the individual rate assessed for Geum Poong Corp." Reply Memorandum in Support of Defendant's Motion to Dismiss at 11. The "all others" rate was lowered only *incidentally*, as a consequence of the reduction in Geum Poong Corp.'s rate. Thus, since Consolidated Textiles did not participate in the *Geum Poong* litigation, Consolidated Textiles is not legally entitled to the revised "all others" rate resulting from that litigation. Consequently, Commerce may apply 19 C.F.R. § 351.212(c)(2) to order liquidation of the subject entries now that the deadline for filing a writ of certiorari with the U.S. Supreme Court has passed, thus rendering *Geum Poong* a final decision.

Accordingly, the Court holds that Consolidated Textiles has failed to present a justiciable claim.

III. CONCLUSION

For the aforementioned reasons, the Court has subject matter jurisdiction under 28 U.S.C. § 1581(i) and holds that the doctrine of collateral estoppel does not apply to Consolidated Textiles's claim. Because Consolidated Textiles has failed to state a claim upon which judicial relief can be granted, this action is dismissed and the pre-

liminary injunction issued in this matter on December 19, 2003 is dissolved.

A separate judgment order will be issued accordingly.

(Slip Op. 04-102)

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

MOTOROLA, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 01-00126

Plaintiff, Motorola, Inc., moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Defendant cross-moves for summary judgment seeking an order dismissing the case.

Held: Plaintiffs' motion for summary judgment granted in part and denied in part. Defendant's cross-motion for summary judgment granted in part and denied in part.

August 13, 2004

Katten Muchin Zavis Rosenman (Michael E. Roll, Kathleen M. Murphy, James L. Sawyer and John P. Smirnow) for Motorola, Inc., plaintiff.

Peter D. Keisler, Assistant Attorney General; Barbara S. Williams, Attorney-in-Charge, International Trade Field Office, Amy M. Rubin, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel, Chi S. Choy, Office of the Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Motorola, Inc. ("Motorola"), moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Motorola contends that the merchandise at issue are classifiable as hybrid integrated circuits as a matter of law. Defendant cross-moves for summary judgment seeking an order dismissing the case.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the

outcome of the suit under the governing law. *See id.* Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See USCIT R. 56; see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

DISCUSSION

I. Background

The merchandise subject to this action ("subject merchandise") was entered through the port of Chicago between January and June of 1998. *See* Compl. ¶ 2. The subject merchandise are circuits used in cell phone battery packs for Motorola cell phones. *See* Mem. Supp. Pl.'s Mot. Summ. J. ("Motorola's Mem.") at 3. The United States Customs Service¹ ("Customs") liquidated the subject merchandise under subheading 8536.30.80 of the United States Harmonized Tariff Schedule ("HTSUS") subject to a duty rate of 3.2 percent *ad valorem*. *See* Compl. ¶ 22. The subject merchandise are used in either nickel or lithium chemistry battery packs. *See* Motorola's Mem. at 3. Plaintiff filed a timely protest and application for further review with Customs challenging the classification of the subject merchandise under HTSUS 8536.30.80. *See* Compl. ¶ 4. Customs issued Head Quarter Ruling ("HQ") 961050 on May 1, 2000, and found that the subject merchandise are classifiable under subheading 8536.30.80 of the HTSUS, as other electrical apparatus for protecting electrical circuits. *See* Motorola's Mem. Ex. 4 at 6. In reaching its decision, Customs noted that the subject merchandise are not classifiable under subheading 8542.40.00 because Motorola's "flex circuits are not constructed with a film layer directly on the substrate and in the mass."² *See id.* at 5. On March 29, 2001, Customs denied Motorola's protest in full. *See* Compl. ¶ 5.

The HTSUS sections relevant to the Court's discussion are set forth below:

- 8536 Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1,000 V (con.):

¹The United States Customs service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108-32 (2003).

²A substrate is "the physical material on which a microcircuit is fabricated; used primarily for mechanical support and insulating purposes, as with ceramic, plastic, and glass substrates." *McGraw-Hill Dictionary of Scientific and Technical Terms* 2061 (6th ed. 2003).

....

8536.30 Other apparatus for protecting electrical circuits:

8536.30.40 Motor overload protectors 3.2%

8536.30.80 Other 3.2%

....

8542 Electrical integrated circuits and microassemblies; parts thereof:

....

8542.40.00 Hybrid integrated circuits free

II. Customs Properly Classified Subject Merchandise Under Heading 8536

A. Contentions of the Parties

1. Motorola's Contentions

Motorola contends that Customs improperly classified the subject merchandise under HTSUS heading 8536. *See* Motorola's Mem. at 28. Specifically, Motorola argues that the subject merchandise should have been classified under heading 8542. *See id.* Under rule one of the General Rules of Interpretation ("GRI 1"), "classification is determined according to the terms of the headings and any relative section or chapter notes." *Id.* Motorola points out that "headings 8541 and 8542 shall take precedence over any other heading in the tariff schedule which might cover them by reference to, in particular, their function." *Id.* (quoting *Harmonized Commodity Description and Coding System*, Explanatory Note, 85.42 (3rd ed. 2002) ("Explanatory Note") at 1,700) (emphasis omitted). Accordingly, "if the [subject merchandise] are classifiable in HTSUS heading 8542, they cannot be classified in heading 8536." *Id.*

Motorola contends that the subject merchandise are defined in Note 5 of the HTSUS as "electronic integrated circuits and microassemblies." *See id.* at 29. Motorola asserts that the *Explanatory Note* set out the following four elements for classifying an article as a "hybrid integrated circuit": (1) an active element obtained by semiconductor technology; (2) a passive element obtained by thin or thick film technology; (3) a single insulating substrate; and (4) the active and passive elements must be indivisibly combined on the substrate. *See id.* (citing *Explanatory Note* at 1,700). Although Motorola concedes that the components theoretically can be removed from the substrate, Motorola maintains that it does not remove the components from the substrate once they are attached. *See id.* at 30. Customs' expert did not contradict evidence that Motorola intends for the elements to be permanently attached to the substrate. *See id.* at

30-31. Based on this intention, Motorola asserts that Customs "needs more than speculation or hypotheticals to create an issue of fact." *Id.* at 31.

Motorola also argues that Customs' HQ 916050 is not entitled to judicial deference because courts "retain an independent responsibility to decide the legal issue regarding the proper meaning and scope of tariff terms." *Id.* at 7. Motorola asserts that judicial deference is only appropriate "if a statute is ambiguous and Congress has left it to the agency to determine the meaning of the ambiguity." Pl.'s Opp'n Def.'s Cross-Mot. Summ. J. & Reply Def.'s Opp'n Pl.'s Mot. Summ. J. ("Motorola's Reply") at 1. Motorola argues that the plain language of the statutes at issue is clear and unambiguous and, therefore, no judicial deference is warranted. *See id.* at 1-2. In addition, Motorola asserts that when classification rulings, such as HQ 916050, are at issue the Court "need only defer to them if it finds them persuasive." Motorola's Mem. at 8 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

2. Customs' Contentions

Customs replies that the subject merchandise does not fall within the definition of hybrid integrated circuits and, therefore, was properly classified under heading 8536 of the HTSUS. *See* Def.'s Mem Sup. Cross-Mot. Summ. J. & Opp'n Pl.'s Mot. Summ. J. ("Customs' Mem.") at 13-22. The parties agree that the subject merchandise contain three of the four elements set forth in the definition of hybrid integrated circuits in Note 5(b)(ii) of Chapter 85. *See id.* at 16. The *Explanatory Note* provides that "indivisible" means that "though some of the elements could theoretically be removed and replaced, this would be a long and delicate task which would be uneconomical under normal manufacturing conditions." *Id.* at 18 (quoting *Explanatory Note*). Here, the evidence indicates that separating the elements from the substrate is economical and not a long and delicate task. *See id.* Accordingly, Customs maintains that classification under heading 8542 is not appropriate.

Customs additionally argues that to meet the definition of hybrid integrated circuits the subject merchandise must contain passive elements that are produced at the same time as the substrate. *See id.* Customs asserts that "[i]t is incontestable that none of the components on the [subject merchandise] in issue were produced at the same time as the substrate." *Id.* Rather, the substrate was purchased by Motorola from an unrelated supplier and then the components were soldered onto the substrate by Motorola. *See id.* at 18-19. Motorola's expert stated that elements on the subject merchandise were indivisibly combined on the substrate, even though commercially available machinery exists that could remove and replace defective components. *See id.* at 19. Motorola, however, discards defective subject merchandise because it is more economical than

incurring the time and expense to fix such merchandise. *See id.* Customs contends that "[w]hile Motorola may have made a business decision not to remove and replace components that are found to be defective on these particular assemblies, that does not render them 'indivisibly combined' for purposes of tariff classification." *Id.* at 20. Customs maintains that the test for whether components are "indivisibly combined" is objective and "not subject to the whims of an individual importer or manufacturer." *Id.* The test for whether the indivisible element has been met "is whether removing and replacing elements on the circuit would be a long and delicate task that would render the procedure uneconomical under normal manufacturing conditions." *Id.* at 21. Motorola did not establish that the procedure to replace defective components on the subject merchandise would be a long and delicate process. *See id.* Consequently, the subject merchandise do not satisfy the tariff definition of hybrid integrated circuits and were properly classified under heading 8536. *See id.* at 21-22.

Customs also argues that HQ 961050 is entitled to *Skidmore* respect. *See id.* at 10-13. Customs' notes that Congress "dictated that, in an action in which an importer is challenging the denial of a protest on an issue such as [the one] raised here, Customs' decision is presumed to be correct." *Id.* at 12 (citing 28 U.S.C. § 2639(a)(1) (1994)). Customs argues that the Court should recognize Customs' expertise in administering and interpreting the tariff statute. *See id.* Based on its thorough and reasoned analysis, and the formality related to the issuing of its decision, Customs contends that HQ 961050 is entitled to *Skidmore* deference.

B. Analysis

1. Motion for Summary Judgment

Determining whether imported merchandise was classified under the appropriate tariff provision entails a two-step process. *See Sabritas, S.A. de C.V. v. United States*, 22 CIT 59, 61, 998 F. Supp 1123, 1126 (1998). First, the proper meaning of specific terms in the tariff provision must be ascertained. Second, whether the imported merchandise falls within the scope of such term, as properly construed, must be determined. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The first step is a question of law and the second is a question of fact. *See id.*; *see also Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). Pursuant to 28 U.S.C. § 2639(a)(1), Customs' classification is presumed correct and the party challenging the classification bears the burden of proving otherwise. *See Universal Elecs.*, 112 F.3d at 491. This presumption, however, applies only to Customs' factual findings, such as whether the subject merchandise falls within the scope of the tariff provision, and not to questions of law, such as Customs' interpretation of a particular tariff provision. *See Sabritas*, 22 CIT at

61, 998 F. Supp. at 1126; see also *Universal Elecs.*, 112 F.3d at 491; *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). When there are no material issues of fact in dispute, as is admitted by both parties in the present case, the statutory presumption of correctness is irrelevant. *Goodman Mfg.*, 69 F.3d at 508.

The ultimate question in every tariff classification is one of law: "whether the merchandise is properly classified under one or another classification heading." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Where, as in the instant case, there is no disputed material issue of fact to be resolved by trial, disposition by summary judgment is appropriate. Pursuant to 28 U.S.C. § 2640(a) (1994), Customs' classification decision is subject to *de novo* review based upon the record before the Court. Accordingly, the Court must determine "whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

2. *Skidmore* Respect

As a preliminary matter, the Court finds that HQ 961050 is entitled *Skidmore* respect. In *Skidmore*, 323 U.S. at 140, the Supreme Court set forth the factors a reviewing court is to consider in determining how much weight an agency's decision is to be afforded. The amount of respect a court affords an agency's decision "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Id.* A Customs classification ruling's power to persuade may vary depending on the *Skidmore* factors articulated in *United States v. Mead*, 533 U.S. 218 (2001). See *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004). Customs has specialized experience which can aid the Court in its review of the questions at issue in this case. See *Mead*, 533 U.S. at 234. Accordingly, Customs classification rulings are entitled to "a respect proportional to [their] 'power to persuade.'" *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

Motorola argues that deference is not warranted because the statutory language defining hybrid integrated circuits is plain and unambiguous. See Motorola's Reply at 1-2. The central issue, however, is the meaning of the indivisible requirement contained in the statutory definition of hybrid integrated circuit. The Court has an "independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms." *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001)). Here, *Skidmore* deference may be warranted if HQ 961050 contains "all those factors which give it the power to persuade, if lacking

power to control." *Skidmore*, 323 U.S. at 140. For the reasons set forth below, the Court finds that the thoroughness and valid reasoning of HQ 961050 is entitled *Skidmore* respect.

3. Classification Under Heading 8536

Pursuant to GRI 1, the definition and scope of terms of a particular provision is to be determined by the wording of the statute and any relevant section or chapter notes. See *Sabritas*, 22 CIT at 62, 998 F. Supp. at 1126-27. GRI 1 states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes. . . ." If a tariff term is not statutorily defined in the HTSUS and its intended meaning cannot be discerned from legislative history, then the definition is determined by ascertaining its common and commercial meaning. See *Lynteq*, 976 F.2d at 697-98; see also *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). To ascertain a tariff term's common meaning, the Court may consult dictionaries and scientific authorities, as well as its own understanding of the term. See *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1998), cert. denied, 488 U.S. 943 (1988). The Court, in determining the definition of tariff terms, may also use the explanatory notes to the HTSUS, which provide guidance in interpreting the language of the statute. See *Bausch & Lomb, Inc. v. United States*, 21 CIT 166, 174, 957 F. Supp. 281, 288 (1997), *aff'd*, 148 F.3d at 1363.³

Note 5(b)(ii) to Chapter 85 sets forth the definition for items classified under heading 8542 as "electronic integrated circuits and microassemblies." Such items include "hybrid integrated circuits in which passive elements . . . obtained by thin- or thick-film technology and active elements . . . obtained by semiconductor technology, are combined to all intents and purposes indivisibly, on a single insulating substrate. . . ." HTSUS Ch. 85 Note 5(b)(ii). The *Explanatory Note* further elaborates and states that hybrid integrated circuits "are microcircuits built up on an insulating substrate on which a thin or thick film circuit has been formed." The *Explanatory Note* further provides that "the components forming a hybrid integrated circuit must be combined to all intents and purposes indivisibly, i.e., though some of the elements could theoretically be removed and replaced, this would be along and delicate task which would be uneconomic under normal manufacturing conditions." *Id.* (emphasis in original).

The statute and accompanying *Explanatory Note* set forth the scope of heading 8542 and the definition of hybrid integrated cir-

³The explanatory notes are not legally binding on the United States, yet they "generally indicate the 'proper interpretation' of provisions within the HTSUS . . . [and] are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading." *Sabritas*, 22 CIT at 62, 998 F. Supp. at 1127.

cuits. Here, whether or not Motorola actually removes or replaces some of the components forming the subject merchandise is irrelevant. The definition of hybrid integrated circuits does not contemplate the actions of a single manufacturer or importer. Rather, the statute requires that the components of the item be combined to all intents and purposes indivisibly, on a single substrate. The *Explanatory Note* indicates that the indivisibility element is measured by whether it is uneconomical or impractical to remove or replace the components from the substrate. In the present case, Motorola has failed to present evidence indicating that the subject merchandise meet this requirement. While Motorola does not remove or replace the components from the substrate or have the intention to do so, the subject merchandise fail to meet the definition of hybrid integrated circuits.⁴ See Motorola's Mem. at 30. Motorola's decision to keep the components on the substrate intact does not render the subject merchandise indivisible. Consequently, Customs properly determined that the subject merchandise do not satisfy the definition of hybrid integrated circuits and are not classifiable under heading 8542 of the HTSUS. Consequently, Customs properly classified the subject merchandise under heading 8536 of the HTSUS, and the decision set forth in HQ 961050 is entitled *Skidmore* respect.

III. Customs' Failure to Publish HQ 961050 in the *Customs Bulletin* Did Not Violate 19 U.S.C. § 1625(c)

A. Statutory Background

Section 1625 of Title 19 of the United States Code sets forth certain measures Customs must take with respect to interpretive rulings and decisions. Customs must publish in the *Customs Bulletin* or make available for public inspection "any interpretive ruling (including any ruling letter, or internal advice memorandum). . . ." 19 U.S.C. § 1625(a) (1994). Section 1625(c)(1) of Title 19 of the United States Code directs Customs to publish in the *Customs Bulletin* a decision that modifies or revokes interpretive rulings or decisions that have been in effect for at least 60 days. Customs is also directed to publish decisions that modify Customs' previous "treatment" of "substantially identical transactions." See 19 U.S.C. § 1625(c)(2). The statute states, in pertinent part:

⁴ Motorola does not dispute Customs' expert who stated that there is commercially available equipment that can be used to remove the components from the substrate. See Motorola's Reply at 4. Motorola also "concedes that theoretically the components can be removed and that other companies making different articles may remove the elements." Motorola's Mem. at 30.

(c) **Modification and revocation**

A proposed interpretive ruling or decision which would—

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision.

19 U.S.C. § 1625(c).

Customs' regulations define a ruling as "a written statement issued by the Headquarters Office . . . that interprets and applies the provisions of the Customs and related laws to a specific set of facts." See 19 C.F.R. § 177.1(d)(1) (1998). A ruling letter is defined as "a ruling issued in response to a written request therefor and set forth in a letter addressed to the person making the request or his designee." *Id.* With respect to the effect of ruling letters, Customs' regulations state that a ruling letter "represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel . . . until modified or revoked." 19 C.F.R. § 177.9(a)(1998). Furthermore, "[i]n the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances." *Id.* Ruling letters indicating the proper classification of merchandise under the HTSUS "will be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." 19 C.F.R. § 177.9(b)(2).

B. HQ 961050 Does Not Modify or Revoke a Prior Interpretive Ruling Letter

1. Contentions of the Parties

a. Motorola's Contentions

Motorola complains that Customs' liquidation of the subject merchandise pursuant to HQ 961050 violated 19 U.S.C. § 1625(c)(1). See Motorola's Mem. at 12-20. Specifically, Motorola contends that the classification of the subject merchandise modifies or revokes the two pre-classification ruling letters obtained by Motorola in 1992 and

1994 ("PRLs").⁵ See *id.* at 12–13. Consequently, by liquidating the subject merchandise under heading 8536 without first publishing HQ 961050 in the *Customs Bulletin*, Customs violated 19 U.S.C. § 1625(c)(1). See *id.* at 13.

Motorola argues that the PRLs meet the definition of the term "interpretive ruling" because 19 U.S.C. § 1625(a) includes "any ruling letter, or internal advice memorandum[] or protest review decision under this chapter with respect to any customs transaction . . ." *Id.* at 14 (quoting 19 U.S.C. § 1625(a)). If Congress intended to exclude PRLs from the definition, then it would have explicitly done so. See *id.* Furthermore, Congress did not provide Customs with the discretionary power to interpret the statute because the language therein "indicates that Congress intended for Customs to follow the procedural requirements of Section 1625(c) when it issues an interpretive ruling or decision." *Id.* at 15. In *American Bayridge Corp. v. United States*, 22 CIT 1129, 35 F. Supp. 2d 922 (1998), *vacated on other grounds*, 217 F.3d 857 (Fed. Cir. 1999), the Court reviewed the legislative history of the statute and rejected Customs' narrow interpretation of 19 U.S.C. § 1625(c). See Motorola's Mem. at 14–16. The Court opined that the legislative history of the statute indicates that Congress did not intend to grant Customs discretion. See *id.* The Court should rely on *American Bayridge* and reject Customs' narrow interpretation of the statute because Customs in this case "has read an unwarranted exception into the statute to limit the scope of Section 1625(c)." *Id.* at 16.

Motorola also notes that Customs' literature explaining PRLs indicates that they are binding classification rulings, which stay in effect until modified or revoked by Customs. See *id.* at 18. The characterization of the PRLs as anything other than rulings is contrary to Customs' description of the Pre-Importation Review Program ("Program").⁶ See *id.* Motorola asks the Court to give the term "ruling" in 19 U.S.C. § 1625(c) the same definition provided for purposes of 28 U.S.C. § 1581(h), as a determination as to the treatment for the contemplated transaction. See *id.* at 19 (citing *Holford USA Ltd., Inc. v. United States*, 19 CIT 1486, 1489–90, 912 F. Supp. 555, 558 (1995)). Motorola argues that "[i]f Congress had intended the word 'ruling' in

⁵In 1992, Motorola sought and obtained Customs' opinion as to the classification of six models of nickel-chemistry battery hybrid integrated circuits. See Motorola's Mem. at 11. In PRL 878763, Customs classified the six models under subheading 8542.20.00, the 1992 version of subheading 8542.40.00, of the HTSUS. See *id.* Similarly, Motorola obtained Customs' opinion as to the classification of other models of nickel-chemistry battery hybrid integrated circuits in 1994. See *id.* In PRL 894316, Customs' classified the six models under subheading 8542.40.00 of the HTSUS and again classified three of the hybrid integrated circuits previously classified in PRL 878763 under subheading 8542.40.00 of the HTSUS. See *id.*

⁶Motorola's PRLs were issued pursuant to the Program, a cooperative, voluntary program between Customs and importers. See Customs' Mem. at 25. Under the Program guidelines, Customs issues PRLs to importers indicating how merchandise specified therein will be classified upon entry. See Motorola's Mem. Ex. 4.

[19 U.S.C. § 1625(c)] to be different from that applied elsewhere in Customs law, it would have express[ed] such an intent." *Id.* at 19. Consequently, Motorola deduces that Customs' interpretation of the statute "is inconsistent with (1) the express terms of PRLs 878763 and 984316 [;] (2) the objectives of the Pre-Importation Review Program[;] and (3) prior judicial and regulatory definitions of the phrase 'ruling.'" *Id.* at 17.

Motorola asserts that HQ 961050 modifies or revokes the PRLs, even though it involved merchandise with different part numbers. *See* Motorola's Reply at 14-15. Motorola notes that there are no published guidelines indicating whether Motorola should have contacted Customs for a new PRL if a part number changed. *See id.* Motorola further asserts that four of the items at issue "are substantially identical to the items that were listed on the PRLs [which] confirms that Motorola did not have to report back to Customs because the nature of its merchandise had not changed." *Id.* at 15. The method Motorola used to indivisibly combine the four remaining items and the use of those items also remained the same. *See id.* Consequently, Motorola contends that its decision not to seek a new PRL was reasonable because it had obtained "two PRLs that both classified this type of merchandise in HTSUS Heading 8542." *Id.*

b. Customs' Contentions

Customs replies that Motorola has failed to establish the required elements of 19 U.S.C. § 1625(c)(1). *See* Customs' Mem. at 22-28. Motorola has failed to demonstrate that HQ 961050 either modifies or revokes a prior interpretive ruling or decision which has been in effect for at least 60 days. *See id.* at 22. Customs argues that, although the definition of "interpretive ruling" encompasses HQ 961050, it does not encompass either of the PRLs. *See id.* at 24. The PRLs are not interpretive rulings because "the common meaning of the term 'interpretive' involves something that provides an explanation." *Id.* To be considered interpretive rulings, the PRLs must explain a statute or provide an explanation of Customs' interpretation of the statute. *See id.* Interpretive rulings, Customs notes, are "publically available complex written analyses by Customs interpreting and applying the facts and law." *Id.* The PRLs do not meet the requirements of interpretive rulings because they lack detail and analysis, and do not include an interpretation of how Customs law applies to the specific set of facts. *See id.* at 26. Moreover, the PRLs are not interpretive rulings because they are "bare-bones," consisting only of a list of article identifiers, brief descriptions and tariff numbers." *Id.* Customs relied on the characteristics of each item provided by Motorola and did not review or analyze every item identified in the PRLs. *See id.*

Customs also notes that pursuant to 19 U.S.C. § 1625(a), an interpretive ruling, ruling letter, internal advice memorandum or protest

review decision must be published in the *Customs Bulletin* or otherwise made publically available. *See id.* at 24. Customs argues that 19 U.S.C. § 1625(a) must be read *in pari materia* with subsection 1625(c). *See id.* Customs' argues that the PRLs are not encompassed by 19 U.S.C. § 1625(c) because they were not published in the *Customs Bulletin* or otherwise made publically available. *See id.* The PRLs were only given to Motorola and apply exclusively to Motorola's import transactions, as defined by the article identifiers and tariff numbers. *See id.* at 26. Consequently, Customs' decision in HQ 961050 does not modify or revoke a prior interpretive ruling or decision because the PRLs do not meet the definition of "interpretive ruling."

Customs alternatively argues that even if the PRLs are interpretive rulings, HQ 961050 did not modify or revoke them. *See id.* at 28. Rather, HQ 961050 did not involve "articles bearing part numbers which appear on either of the preclassification rulings. . . ." *Id.* Customs asserts that "Motorola confuses the 'substantially identical transactions' language of section 1625(c)(2), which involves the modification of a treatment, with the language of 1625(c)(1) dealing with the modification or revocation of a prior interpretive ruling." Def.'s Reply Pl.'s Resp. Def.'s Cross-Mot. Summ. J. ("Customs' Reply") at 12. Customs maintains that the PRLs apply only to the merchandise they identify therein. *See id.* Consequently, HQ 961050 and the PRLs are unrelated rulings and the former does not revoke or modify any determination rendered in either of the PRLs. *See Customs' Mem.* at 28.

2. Analysis

Both parties assert that the central issue is whether the PRLs are "interpretive rulings" within the scope of the statute. It is uncontested that HQ 961050 is an interpretive ruling. *See Customs' Mem.* at 24; Motorola's *Mem.* at 13. Consequently, the Court must determine (1) whether the PRLs are interpretive rulings under 19 U.S.C. § 1625(c)(1), and (2) if the PRLs are interpretive rulings, whether HQ 961050 modifies or revokes them. For the reasons set forth below, the Court finds that the PRLs meet the definition of interpretive rulings, and that HQ 961050 does not modify or revoke a prior interpretive ruling. Accordingly, Customs failure to publish HQ 961050 in the *Customs Bulletin* did not violate 19 U.S.C. § 1625(c)(1).

First, the Court agrees with Motorola's assertion that the PRLs are "interpretive rulings." The statute defines "interpretive ruling" as any ruling letter, internal advice memorandum or protest review decision. *See* 19 U.S.C. § 1625(a). The statute directs Customs to publish such interpretive ruling in the *Customs Bulletin* within 90 days after the date of issuance. *See id.* Customs notes that the PRLs do not meet the definition of an interpretive ruling because neither was published in the *Customs Bulletin*; the PRLs were made avail-

able only to Motorola. *See* Customs' Mem. at 26. Customs' logic, however, is unconvincing. The statute does not state that to be considered an interpretive ruling the letter must be published in the *Customs Bulletin*. Rather, the statute directs Customs to publish interpretive rulings, which includes any ruling letter or internal advice memorandum, in the *Customs Bulletin*. *See* 19 U.S.C. § 1625(a). A letter may be an interpretive ruling even if Customs fails to publish such a ruling letter.

Contrary to Customs contention, the PRLs do interpret and apply Customs law to a particular set of facts. Customs notes that its regulation define a "ruling" as a written statement "that interprets and applies the provisions of the Customs and related laws to a specific set of facts." Customs' Mem. at 25 (quoting 19 C.F.R. § 177.1(d)(1)). Customs argues that the PRLs do not fulfill either one of these requirements because they fail to give an interpretation of the law or analyze how the law applies to a specific set of facts. *See id.* at 26. The Court, however, disagrees with Customs' assertions. Under the Program, Customs' "classification rulings [are] based on an item-by-item review of the importers product inventory." Motorola's Mem. Ex. 3 at 3. In determining the classification of an item, Customs implicitly analyzes each item. Otherwise, Customs could not properly classify the merchandise identified in the PRLs. Moreover, the PRLs implicitly provide an interpretation of Customs law that is applied to a specific set of facts.

The purpose of the Program, according to Customs' literature, is "to resolve classification, valuation, and admissibility issues prior to importation thereby expediting import processing." *Id.* at 1. Customs' list of items and their respective classification in the PRLs binds Customs. *See id.* at 3. In making a binding ruling, Customs must interpret and apply the HTSUS to the merchandise at issue. Failure to do so would lead to classifications that are arbitrary and not in accordance with law. Although the PRLs are "bare-bones," they contain a list of identifiers, brief description and tariff numbers indicating Customs' classification determination.⁷ *See* Motorola's Mem. Ex. 1 & 2. The review process Customs undertakes when preparing a PRL requires an interpretation and application of the relevant HTSUS heading. Based on the definition of "interpretive rulings" offered by Customs, the Court finds that, for the purposes of 19 U.S.C. § 1625(c)(1), the PRLs are prior interpretive rulings.

Second, although the PRLs are interpretive rulings, HQ 961050 does not modify or revoke them. Customs is required to publish in the *Customs Bulletin* any interpretive ruling or decision, if and only

⁷ Although the PRLs do not contain a detailed explanation of Customs' determination, the PRLs announce Customs' decision based on an interpretation of the statute. In order to be "interpretive rulings," the PRLs do not have to contain a detailed description of Customs' reasoning.

if, it modifies or revokes a prior interpretive ruling. *See* 19 U.S.C. § 1625(c)(1). Each PRL applies "only to shipments of the merchandise actually reviewed and covered under the specific ruling decision." Motorola's Mem. Ex. 3 at 4. In its description of the Program, Customs states that PRLs will be made available only "in those instances where the importer's product inventory lends itself to an item-by-item review. . . ." *Id.* at 3. Consequently, Customs pre-classification ruling binds Customs only with respect to the items identified in the PRLs and not any other merchandise, even if it is substantially identical.

In the case at bar, Motorola does not argue that the subject merchandise is covered by the PRLs. Rather, Motorola argues that the PRLs identify certain items that are substantially identical to some of the subject merchandise. *See* Motorola's Reply at 15. For the remaining subject merchandise, Motorola argues that they were made the same way and have the same use as the articles listed in the PRLs. *See id.* Based on the similarities of the merchandise identified in the PRLs and the subject merchandise, Motorola argues that HQ 961050 modifies or revokes a prior interpretive ruling. *See id.* Motorola's arguments, however, are untenable. The merchandise covered by HQ 961050 is different than that covered by the PRLs. HQ 961050 is an interpretive ruling or decision that has no bearing whatsoever on the merchandise identified in the two prior PRLs. Accordingly, the Court finds that Customs failure to publish HQ 961050 is not a violation of 19 U.S.C. § 1625(c)(1) because it is an interpretive ruling or decision that does not modify or revoke a prior interpretive ruling.

C. HQ 961050 Modifies the Treatment Previously Accorded to Certain Substantially Identical Transactions

1. Contentions of the Parties

a. Motorola's Contentions

Motorola alternatively argues that Customs violated 19 U.S.C. § 1625(c)(2). *See* Motorola's Mem. at 20. Motorola contends that HQ 961050 effectively modified the treatment Customs afforded to substantially identical merchandise and, therefore, it should have been published in the *Customs Bulletin*. *See id.* Motorola argues that the disposition of merchandise prior to the issuance of HQ 961050 constitutes a "treatment." Furthermore, the merchandise Motorola imported prior to Customs' classification of the subject merchandise under HTSUS heading 8536 (the "earlier merchandise") is "substantially identical" to the subject merchandise. Consequently, the classification of the subject merchandise under heading 8536, modified the

"treatment" of "substantially identical transactions," and Customs was required to publish its decision in the *Customs Bulletin*.

First, Motorola argues that classification of the subject merchandise under heading 8536 of the HTSUS modifies the treatment afforded to merchandise imported pursuant to the PRLs. *See id.* Such classification also modified the treatment afforded to over 900 entries of substantially identical merchandise imported by Motorola between May 1995, and May 1997. *See id.* Customs concedes that its liquidation of ten models of hybrid integrated circuits in over 900 entries can constitute a "treatment" for purposes of 19 U.S.C. § 1625(c)(2). *See id.* Customs maintains, however, that since the 900 entries were on bypass status they could not receive a "treatment." *See id.* Motorola asserts that this narrow interpretation of the term "treatment" does not comport with the Court's broad interpretation, in *Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 1040-44, 116 F. Supp. 2d 1350, 1373-78 (2000). The Court held that the payment of 69 drawbacks during a four-and-a-half year period constituted a "treatment." *See id.* Motorola further asserts that even if the subject merchandise is on "bypass status," Customs remains responsible for the classification of the imported items. *See* Motorola's Reply at 17. Consequently, Motorola maintains that the consistent classification of over 900 entries during a two-year period, as well as the classification of merchandise pursuant to the PRLs, also constitutes a "treatment." *See* Motorola's Mem. at 22.

Second, Motorola argues that the subject merchandise and the earlier merchandise are "substantially identical." *See id.* at 23-28. Both were made using the same method of construction and their functions are the same: (1) they connect the charging device and the battery cells; (2) they connect the cell phone or two way radio and the battery cells; (3) they identify the battery pack to the charging device; (4) they sense battery cell temperature; and (5) they provide a safety mechanism. *See id.* at 23. Motorola notes that there are differences between the earlier and subject merchandise. *See id.* at 25. Yet, Motorola argues that the test is based on "substantial" and not "exact" identity, and even "Customs' expert considers them substantially identical." *Id.* at 25. Furthermore, Customs' expert agreed that four of the subject merchandise, the nickel-chemistry assemblies, are substantially identical to the hybrid integrated circuits covered by the PRLs and the merchandise imported between May 1995, and May 1997. *See id.* The criteria used to determined substantial identity should be (1) the function and use of the item; (2) the presence of at least one active and one passive element, and (3) the use of one substrate and the method of attaching the active and passive elements to the substrate. *See id.* at 27-28. Based on these criteria, Motorola contends that the subject merchandise are substantially identical to the earlier merchandise. *See id.* at 28.

b. Customs' Contentions

Customs replies that Motorola has failed to demonstrate that the application of the PRLs "creates a 'treatment' that would trigger [19 U.S.C. § 1625(c)(2)] for any articles not specifically identified therein." Customs' Mem. at 28. The guidelines of the Program provide that each PRL applies specifically to the shipments of merchandise actually reviewed and encompassed within. *See id.* The PRLs encompass only the part numbers identified, and "Motorola was obligated to update the information it submitted to Customs if it wanted to have any additional articles treated in the same manner." *Id.* at 29. The PRLs do not demonstrate a "treatment" by Customs because they apply to specific items identified therein. *See id.*

Customs also argues that the liquidation of over 900 entries of merchandise does not establish a "treatment" under the statute. *See id.* at 29-32. Customs concedes that, in some instances, the liquidation of so many entries under a provision may constitute a "treatment." *See id.* at 29. The facts in this case, however, do not establish such a finding. *See id.* The entries liquidated between May 1995, and May 1997, were on "bypass status" and did not involve any action by a Customs official. *See id.* at 30. Customs also notes that the facts of this case are different from those in *Precision*, 24 CIT at 1039-44, 116 F. Supp. at 1373-78, which Motorola cites in support of its argument. Customs points out that in *Precision*, 24 CIT at 1039-44, 116 F. Supp. at 1373-78, 69 drawback claims were granted because of actions performed by Customs. *See* Customs' Mem. at 30. In the case at bar, however, Customs did not take any action because over 900 entries were on "bypass status" and not reviewed prior to liquidation. *See id.*

Customs further contends that the regulations for the implementation of 19 U.S.C. § 1625(c) were recently amended to exclude the consideration of bypass entries for section 1625(c)(2) purposes. *See id.* Under the new regulation, "Customs will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review." *Id.* (quoting 19 C.F.R. § 177.12(c)(ii) (2003)). Customs acknowledges that the subject merchandise was entered prior to the amendment, yet Customs argues that "the Court should accord the highest degree of deference to this amendment." *Id.* Customs maintains that the regulation is entitled to *Chevron* deference, and notes that in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1995), a regulation was entitled to *Chevron* deference even though it had been enacted after the initiation of the lawsuit. *See* Customs' Mem. at 31. Consequently, Customs asserts that the Court should not consider the 900 entries, which were on "bypass status," in determining "whether Motorola has established a 'treatment' of its merchandise as hybrid integrated circuits." *Id.* at 32.

Customs concedes that if there was a "treatment" pursuant to 19 U.S.C. § 1625(c)(2), then "four of the eight articles in issue are 'substantially identical' to at least some of the articles provided by Motorola to [Customs] for comparison purposes." *Id.* at 33. Citing the dictionary, Customs argues that the remaining four articles are not "substantially identical" to the merchandise submitted for comparison, unless they "have almost the same essential characters or features." *Id.* at 34. Customs maintains that the four articles at issue do not pass this test and notes that "Motorola wants the Court to take the most expansive view possible when comparing the imported circuit assemblies and ignore the significant differences in technology, construction and function among these articles." *Id.* at 35. Customs urges the Court to reject Motorola's interpretation because of the differences between the four articles at issue, which are used with lithium-ion battery cells (the "Lithium-ion Assemblies"), and those submitted by Motorola for comparison, which are used with nickel based batteries (the "Nickel Assemblies"). *See id.* at 35-37. Based on these differences, Customs requests the Court "follow the opinion of [Customs] expert and find that the importations of four of the eight articles in issue are not 'substantially identical transactions' to importations of any other flexible circuit assemblies relied on by Motorola for purposes of establishing a 'treatment' " under 19 U.S.C. § 1625(c)(2). *Id.* at 37-38.

2. Analysis

To demonstrate a violation of 19 U.S.C. § 1625(c)(2), Motorola must show that HQ 961050 was an interpretive ruling or decision which modified a "treatment" previously accorded by Customs to "substantially identical transactions." Motorola must show that Customs failed to follow the notice and comment process outlined in the statute. It is uncontested that HQ 961050 is an interpretive ruling or decision and that it was not published in the *Customs Bulletin*. Consequently, the Court must determine whether Customs afforded a "treatment" to "substantially identical transactions."

First, the Court finds that Motorola has successfully demonstrated that Customs' liquidation of over 900 entries was a "treatment" under the statute. In determining the meaning of a term that is undefined in a statute, the Court normally gives such term its ordinary, contemporary, common meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Precision*, 24 CIT at 1042, 116 F. Supp. at 1376. The Court has previously noted that the ordinary definition of the term "treatment" includes "words such as 'often', 'customarily' and 'pattern' — all terms which necessitate multiple occurrences." *Precision*, 24 CIT at 1042, 116 F. Supp. 2d at 1376. The term "treatment" signifies a pattern or some form of customary practice. *See id.* The statute uses the term "treatment" with reference to "substantially identical transactions," which indicates that a single anteced-

ent transaction is not enough to trigger the statute. See *Precision*, 24 CIT at 1043, 116 F. Supp. 2d at 1376-77. Moreover, "[t]he term 'treatment' looks to the actions of Customs, rather than its 'position' or policy."⁸ *Id.* (emphasis in original).

In the case at bar, Customs concedes that "so many liquidations under a claimed provision might, in some cases, create a 'treatment'" for 19 U.S.C. § 1625(c)(2) purposes. Customs' Mem. at 29. Customs argues, however, that "the circumstances presented here do not warrant such a finding." *Id.* Customs notes that the over 900 entries liquidated between May 1995, and May 1997, were on "bypass status" and, therefore, did not involve any action performed by Customs. See *id.* at 30. The Court, however, disagrees. As the Court has previously noted, "Customs uses its bypass procedures to manage its workload," and reviews the entries' tariff classification for accuracy. *G&R Produce Company v. United States*, 27 CIT ___, ___, 281 F. Supp. 2d 1323, 1333 (2003). Moreover, although the entries are on "bypass status," Customs continues to randomly sample and review them for accuracy.⁹ See *id.* Accordingly, the Court finds that the liquidation of over 900 entries of merchandise, which are on "bypass status," require Customs to act and constitute a "treatment" for purposes of the statute.

Although 19 C.F.R. § 177.12(c)(ii) was promulgated after the commencement of the current litigation, Customs argues that the Court may still consider it in deciding the case at bar. See Customs' Mem. at 30-32. Moreover, Customs asserts that the relevant regulation is entitled to *Chevron* deference because the statute is silent or ambiguous with respect to the specific issue, and Customs' interpretation is a permissible construction of the statute. See *id.* (citing *Chevron*, 467 U.S. at 842). The Court, however, does not agree with Customs. The regulation does not deserve *Chevron* deference because the statute directly speaks to the precise question at issue.¹⁰

⁸The term "position" is defined as a practice or policy which entails a conscious decision by Customs. *Precision*, 24 CIT at 1043, 116 F. Supp. 2d at 1377. The "treatment" afforded an item is not related to the "position" taken by Customs, but rather is just an indicia of how the item was treated or afforded in the past by Customs. See *id.* Accordingly, "a treatment [or action] may be found where a 'position' [or policy] might not — [] the definition of 'treatment' does not require publication or liquidation among many ports over many years." *Id.*

⁹Customs mischaracterizes what "bypass status" means in stating that "the vast majority of the entries [in *G&R Produce*, 27 CIT ___, ___, 281 F. Supp. 2d 1323 (2003)] were 'bypass' entries, meaning that the entries were filed electronically and no Customs official had actually reviewed them prior to liquidation." Customs' Reply at 13-14 (emphasis added). The Court points out that "[i]n order to place entries on bypass, Customs reviews the entries' tariff classification for accuracy." *G&R Produce*, 27 CIT at ___, ___, 281 F. Supp. 2d at 1333. To place an entry on "bypass status" requires Customs to perform some action in reviewing an entry's tariff classification.

¹⁰Customs' regulation interprets the term "treatment" used in 19 U.S.C. § 1625(c)(2). Because such interpretation is not permissible under *Chevron*, the Court will not address

In *Chevron*, 467 U.S. at 842, the United States Supreme Court set forth a two-prong analysis that governs the degree of judicial deference for agency interpretations of statutes, which the agency is charged with administering. Under *Chevron*, the first question for the Court is "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the Court finds that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. With respect to 19 U.S.C. § 1625(c)(2), the Court finds that the intent of Congress is clear on its face and that the statute is not silent or ambiguous. See *Precision*, 24 CIT at 1040, 116 F. Supp. 2d at 1374 (stating that "[t]he lack of any specific legislative history [for 19 U.S.C. § 1625(c)], however, does not eliminate this court's duty to employ the plain meaning of the language that the Congress adopted"). Congress has neither explicitly nor implicitly left a gap to be filled by Customs because the meaning of the term "treatment" is not ambiguous. See *Chevron*, 467 U.S. at 842. Accordingly, Customs' statutory interpretation in 19 C.F.R. § 177.12(c)(ii) is not based on a permissible construction of the statute and, therefore, the regulation is not entitled to *Chevron* deference.

Second, although the liquidation of over 900 entries constitutes a "treatment" for purposes of 19 U.S.C. § 1625(c)(2), Motorola has failed to fully demonstrate that such treatment was accorded by Customs to "substantially identical transactions." Customs concedes that four of the eight subject merchandise¹¹ are "substantially identical" to the articles submitted by Motorola for comparison purposes. See Customs Mem. at 33. The Court agrees with Motorola that "there is no dispute that the nickel-chemistry based [subject merchandise] are substantially identical to the nickel-chemistry based [hybrid integrated circuits] in the PRLs and the [hybrid integrated circuits] imported between May 1995 to May 1997." Motorola's Mem. at 25. Customs violated the statute with respect to the four Nickel Assemblies by failing to publish HQ 961050 because it was an interpretive ruling or decision that modified or revoked a treatment Customs previously accorded to substantially identical transactions.

With respect to the remaining four Lithium-ion Chemistry Assemblies, the Court finds that Customs did not violate the statute. Motorola correctly asserts that to determine whether "substantially identical transactions" exist, the "test is 'substantial' and not 'exact.'" Motorola's Mem. at 25. The plain meaning of the phrase "substantially identical" can be discerned from the dictionary definitions

whether a new regulation should have an effect on the outcome of litigation initiated prior to the issuance of such regulation.

¹¹ These are part numbers 5108189Z16, 5180569A02, 5104035T03 and 5180569A03. See Customs' Mem. Ex. 4.

of each term. See *Perrin*, 444 U.S. at 42. The term "substantial" is defined as "[b]eing of considerable importance, value, degree, amount, or extent." *Webster's II New Riverside University Dictionary* 1155 (1988). The term "identical" is defined as "[b]eing the same[,] exactly equal and alike[,] [h]aving such similarity or near resemblance as to be fundamentally equal or interchangeable." *Id.* at 607. Motorola asserts that the criteria for determining substantial identity is (1) the use and function of an item; (2) the presence of at least one active and one passive element; (3) the use of one substrate; and, (4) the method of attaching the active and passive elements to the substrate. See Motorola's Mem. at 27-28. The Court does not agree because such criteria do not meet the definitions of the terms "substantially identical."

Although the Lithium-ion Chemistry Assemblies and the Nickel Assemblies may be made in much the same manner and serve similar purposes, the two sets of assemblies fall short of being identical. The definition of the term "identical" requires the two assemblies to "have such similarity or near resemblance as to be fundamentally equal or interchangeable." *Webster's II* at 607. The record indicates that the Lithium-ion Chemistry Assemblies and the Nickel Assemblies are not "fundamentally equal" because they have significant differences. Principally, one set of assemblies are used with lithium-ion battery cells while the others are used with nickel-based batteries. Consequently, Customs did not violate 19 U.S.C. § 1625(c)(2) with respect to the Lithium-ion Chemistry Assemblies.

CONCLUSION

The Court finds that Customs' properly classified the subject merchandise under heading 8536 of the HTSUS. Moreover, Customs' failure to publish HQ 916050 did not violate 19 U.S.C. § 1625(c)(1). Although the PRLs are interpretive rulings or decisions, HQ 916050 deals with merchandise that is not identified in the PRLs. Accordingly, HQ 916050 did not modify or revoke a prior interpretive ruling or decision. The Court, however, finds that Customs violated 19 U.S.C. § 1625(c)(2) with respect to the Nickel Assemblies but not the Lithium-ion Chemistry Assemblies. Accordingly, Motorola's motion for summary judgment is granted in part and denied in part, and Customs' cross-motion for summary judgment is granted in part and denied in part. Judgment shall be entered accordingly.

Slip Op. 04-103

CARPENTER TECHNOLOGY CORPORATION, PLAINTIFF, v. UNITED STATES, DEFENDANT, and VIRAJ GROUP, INTERVENOR-DEFENDANT.

Court No. 02-00448

[Plaintiff's motion for judgment on agency record granted; remanded to International Trade Administration.]

Decided: August 16, 2004

Collier Shannon Scott, PLLC (Robin H. Gilbert) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Elizabeth G. Candler*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Christine J. Sohar*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Judge: This is another case contesting a determination of the International Trade Administration, U.S. Department of Commerce ("ITA") to group (or not to group) together Indian enterprises for purposes of enforcement of its *Antidumping Duty Order: Certain Stainless Steel Wire Rods from India*, 58 Fed. Reg. 63,335 (Dec. 1, 1993). In *Stainless Steel Wire Rod From India; Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 31,302 (May 17, 2000), for example, the ITA determined not to group together (or "collapse") Viraj Alloys, Ltd. ("VAL") and Viraj Impoexpo, Ltd. ("VIL") for the period of review ("POR"), December 1, 1997 to November 30, 1998. That determination was affirmed on appeal *sub nom. Viraj Group, Ltd. v. United States*, 25 CIT 1017, 1031, 162 F.Supp.2d 656, 670 (2001)[hereinafter referred to as "*Viraj I*"]:

... Commerce determined that VAL produces steel billets and that VIL manufactures both stainless steel bright bar and stainless steel wire rod. ... Commerce concluded that the production facilities necessary to manufacture these diverse products were sufficiently different as to require substantial retooling of either facility in order to restructure manufacturing priorities. ... Because Viraj failed to meet the first collapsing requirement of 19 C.F.R. § 351.401(f)(1), Commerce stated the issue of price manipulation was moot. ... As Plaintiff was unable to comply with the requirements for collapsing set forth in ... § 351.401(f), this Court ... finds that Commerce properly chose not to collapse VAL and VIL for purposes of calculating the value of steel billet.

Citations omitted.

I

The next such period of administrative review was December 1, 1999 through November 30, 2000 and resulted in the ITA's *Stainless Steel Wire Rod From India; Final Results of Anti-dumping Duty Administrative Review*, 67 Fed.Reg. 37,391 (May 29, 2002), which is at issue in this action based upon the following analysis:

Collapsing

The Viraj Group is composed of . . . four companies: Viraj Forgings, Ltd. ("VFL"); . . . VAL[]; . . . VIL[]; and Viraj USA, Inc. . . . , which was incorporated during the POR on May 22, 2000. The Department has preliminarily determined that these four companies are affiliated for the purposes of this administrative review, and that the three producing companies, VAL, VIL, and VFL, should be collapsed and considered one entity pursuant to section 771(33) of the Act and section 351.401(f) of the Department's regulations. See [ITA] . . . *Collapsing Memorandum of the Viraj Group, Limited*, dated December 31, 2001.

The Department has found the four companies affiliated based on the evidence on the record . . . that Mr. Chhatwal and Mr. Kochhar are the directors for all four companies, and they jointly run all four companies, and their decisions are made for the interest of the group as a whole. Furthermore, the stock of VAL, VFL and VIL is mainly held by Mr. Chhatwal, Mr. Kochhar, and their relatives. Collectively, this group holds more than 40% of the shares in VIL, VAL, and VFL. Also, VFL owns 100% of Viraj USA.

We find that the three producing companies (VAL, VIL, and VFL) should be collapsed because the evidence on the record indicates that VAL, VFL and VIL each use production facilities for similar or identical merchandise that would not require substantial retooling of any facility in order to restructure manufacturing priorities. For sales to the home market, VAL makes billets and then sends them to an unaffiliated subcontractor for rolling into wire rod. The sub-contractor returns the black wire rod to VAL who sells it in the home market as subject merchandise. For sales to the U.S. market, VIL and VFL purchase the billets from VAL and send them to the same sub-contractor that VAL uses for rolling into wire rod. The subcontractor returns the black wire rod which is then annealed at VFL's facilities, pickled at VIL's facilities, packed and then exported. Consequently, VAL, VFL and VIL are all considered "producers" of this wire rod for purposes of this review. Given that VAL, VIL and VFL all produced wire rod during the POR, no substantial retooling would be needed to restructure priorities among the three companies. Moreover, the companies are under common

control and ownership, they use the same production facilities for producing wire rod, and the operations of the companies are intertwined. Therefore, the companies are capable, through their sales and production operations, of manipulating prices or affecting production decisions.¹

Section 771(33) of the Trade Agreements Act of 1979, as amended, referred to above, 19 U.S.C. §1677(33), defines "affiliated" or "affiliated persons", among others, to be:

(B) Any officer or director of an organization and such organization.

(C) Partners.

(D) Employer and employee.

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(G) Any person who controls any other person and such other person.

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

The ITA regulation cited, 19 C.F.R. §351.401(f) (2002), provides:

Treatment of affiliated producers in antidumping proceedings—

(1) *In general.* In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

¹ *Stainless Steel Wire Rod From India; Preliminary Results of Antidumping Duty Administrative Review*, 67 Fed.Reg. 865, 866-67 (Jan. 8, 2002). The ITA's subsequent *Final Results*, which the plaintiff contests herein, adopted this analysis, as well as that set forth in the agency's Issues and Decision Memorandum ("DecMemo") dated May 21, 2002, a copy of which is at tab 4 in Plaintiff's Appendix. See 67 Fed.Reg. at 37,392.

(2) *Significant potential for manipulation.* In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

- (i) The level of common ownership;
- (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
- (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

A

Following publication of the above-quoted analysis in the agency's *Preliminary Results*, the domestic petitioners, including Carpenter Technology Corporation, objected to the collapsing of VAL into VFL and VIL. Among other things, they asserted that, "without the use of independent unaffiliated sub-contractors, VAL, VFL and VIL are unable to produce subject merchandise." DecMemo, pp. 2-3. The agency responded, in part, as follows:

Petitioners['] argument that the Department misinterpreted the meaning of section 351.401(f)(1) . . . is incorrect. Petitioners state that the focus of [that] section . . . is on production facilities and not product lines. This distinction is not relevant in this case, as all three Indian companies use the production facilities of the same unrelated company to manufacture wire rod through a sub-contracting arrangement. It is irrelevant that only VAL has steel making capabilities. VIL and VFL do not need steel making capabilities in order to produce subject merchandise, as all three companies are currently producing wire rod, through the sub-contracting process. Thus, it is unnecessary for any substantial re-tooling to take place for this process to continue.

Id. at 4.

This response precipitated the filing of Carpenter's complaint herein and its motion for judgment upon the agency record pursuant to USCIT Rule 56.2, which is governed by the standard of judicial review that the ITA's determination not be "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(1)(B)(i).

The court's jurisdiction is based upon 28 U.S.C. §§ 1581(c), 2631(c).

B

The court in *Viraj I*, *supra*, pointed out that "Commerce may collapse companies only when the regulatory requirements are satisfied". 25 CIT at 1030, 162 F.Supp.2d at 669. Here, the plaintiff parses 19 C.F.R. §351.401(f)(1), *supra*, into three contingent conditions, namely:

(1) each of the producers has production facilities for similar or identical products;

(2) those production facilities would not have to be substantially retooled for any of the companies to restructure manufacturing priorities; and

(3) if the above conditions exist, the Secretary must also find that there is a significant potential for the manipulation of price or production between the companies.

Plaintiff's Reply Brief, p. 2. The defendant does not disagree. *See* Defendant's Memorandum, p. 10. It considers the third to be the "central question" of the regulation, but counsel seemingly overlook the standard the ITA has set — significant, not just some or any, potential manipulation of price or production *viz.*:

... The fact that the affiliated companies use tollers does not preclude the possibility of price manipulation — the central question of the collapsing regulation.²

And:

... Commerce properly collapsed the Viraj Group's affiliated companies because it determined that "[e]ach is able to produce subject merchandise without changing production facilities or product lines." ... Based upon this determination, price manipulation is possible.

Id. at 14 (citations omitted). The fact that the Viraj firms are "capable, through their sales and production operations, of manipulating prices or affecting production decisions"³ applies with equal logic, of course, to any and all business enterprises.

² Defendant's Memorandum, p. 12. This seemingly-quaint term, *toller*, is found in subsection (h) of 19 C.F.R. §351.401:

Treatment of subcontractors ("tolling" operations). The Secretary will not consider a *toller* or subcontractor to be a manufacturer or producer where the *toller* or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product.

³ 67 Fed. Reg. at 867.

The ITA's *Preliminary Results*, quoted hereinabove, cite its *Collapsing Memorandum* dated December 31, 2001, wherein agency staff find (at page 5) that VIL, VFL and VAL

have a significant potential, through their sales and production operations, of manipulating prices or affecting production decisions, given that the companies are intertwined and share directors, facilities and information.

In re *Stainless Steel Bar from India*, 67 Fed.Reg. 45,956 (July 11, 2002), amended, 67 Fed.Reg. 53,336 (Aug. 15, 2002), however, the nature and affiliation of these same three Viraj firms

highlight[] the degree of confusion pertaining to the interpretation of the collapsing regulation, and the incongruity manifested in applying the regulation to the facts at hand.

Slater Steels Corp. v. United States, 28 CIT ___, ___, 316 F.Supp. 2d 1368, 1372 (2004). Indeed, in this case before the court, the Collapsing Memorandum presents a seeming mix-up of the factors of 19 C.F.R. §351.401(f)(1) with those set forth in subsection (f)(2). And this kind of "totality-of-the-circumstances" approach has caused the court in *Slater Steels* to order and to re-order the ITA to explain why it did not analyze the "prongs" of subsection (f)(1) separately from the issue of manipulation per (f)(2). See 28 CIT at ___, 316 F.Supp.2d at 1372-74. Cf. *Slater Steels Corp. v. United States*, 27 CIT ___, 279 F.Supp.2d 1370 (2003).

(1)

The court in *Viraj I* deemed potential manipulation a "moot"⁴ matter in the light of the agency conclusion that the VAL and VIL production facilities were sufficiently different as to require substantial retooling of either facility in order to restructure manufacturing priorities. Apparently, that difference remains the case now.

The record reflects that in *Viraj I* VAL produced stainless steel billets that were transferred to a subcontractor for rolling into wire rod and then sold to VIL for processing into the subject merchandise. During the instant POR, VAL continued to produce billets and then send them to a subcontractor for rolling into such merchandise — for sale in the home market. On its part, VIL received billets from VAL which it sent to that same subcontractor for rolling.

As for VFL, it did not produce or export subject merchandise during the *Viraj I* POR, but this time, like VIL, it purchased VAL billets that it also transferred to the subcontractor of choice for processing⁵.

⁴ 25 CIT at 1031, 162 F.Supp.2d at 670.

⁵ As recited above, VIL pickled both its wire rod and, pursuant to contract, that of VFL, while the latter annealed both its product and, pursuant to contract, that of VIL.

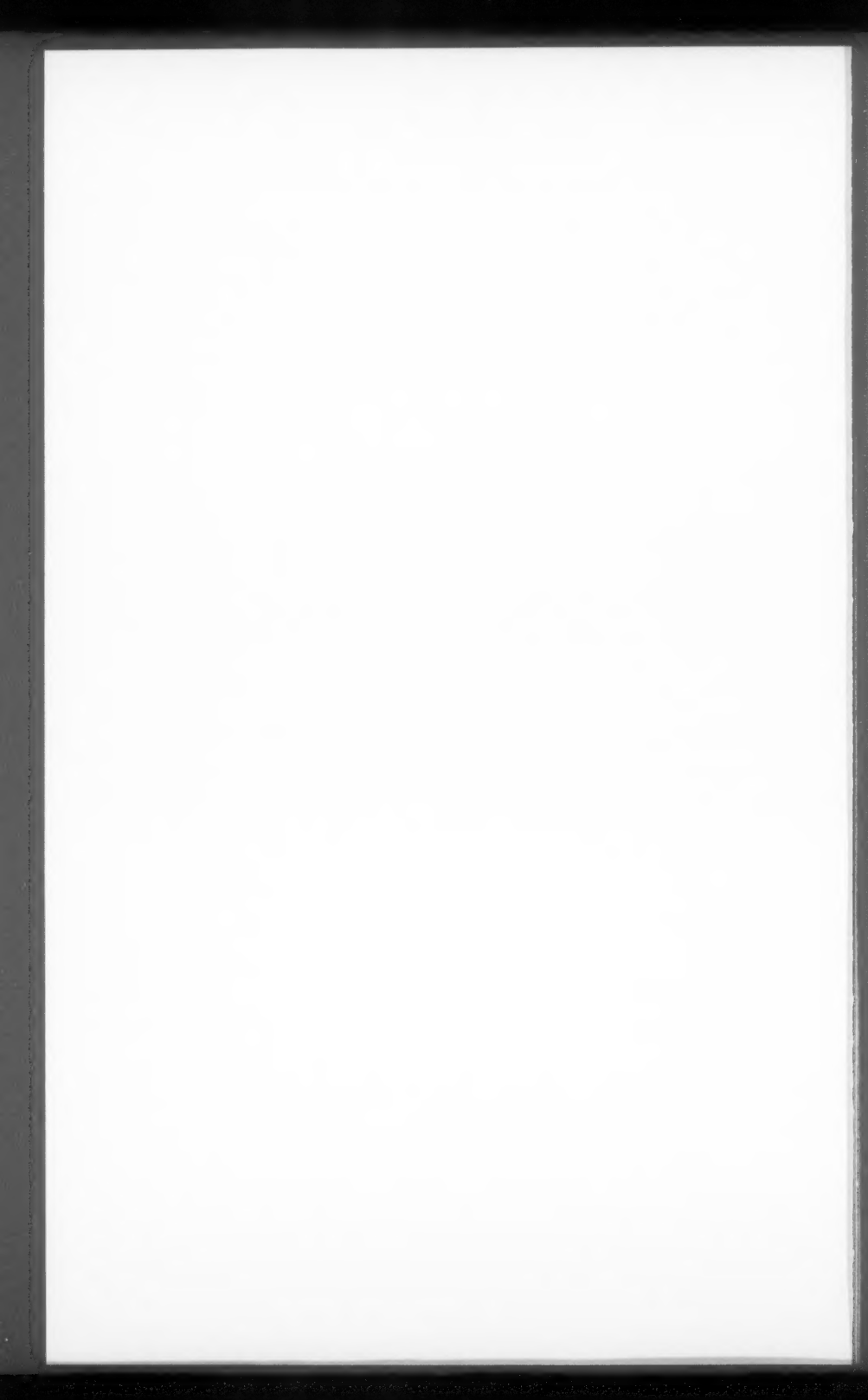
Both VIL and VFL exported the rolled wire rod to the United States via Viraj USA, Inc.

The ITA's Collapsing Memorandum explains that the foregoing reveals but two changes from the previous review in *Viraj I*, namely, VAL did not produce subject merchandise, and VFL neither produced nor exported at that time. If this is all that actually changed, the court cannot conclude that *Viraj I* should not be followed herein. In the absence of evidence to the contrary, the court assumes the sub-contracts for rolling to have been arm's-length and lawfully-binding that made any price or production manipulation by and between VAL and VIL and/or VFL during the period of review less likely than if those three affiliated enterprises were involved in the manufacture and sale of the subject merchandise exclusively with their own facilities. Cf. 19 C.F.R. 351.401(h), *supra* n. 2.

II

In the absence of any agency showing herein that dispels this logic based upon substantial evidence on the record, plaintiff's motion for judgment thereon must be granted to the extent of remand to the ITA for calculation and imposition of individual antidumping-duty margins upon Viraj Impoexpo, Ltd. and Viraj Forgings, Ltd. in the manner of the approach taken by the agency, and affirmed by the court, in *Viraj Group, Ltd. v. United States*, 25 CIT 1017, 162 F.Supp.2d 656 (2001).

The defendant shall have until October 18, 2004 to carry out this remand, whereupon the plaintiff may have until November 1, 2004 to serve and file any comments on the results thereof. So ordered.



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